Supreme Court, U.S.
FILED

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No.
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In The
Supreme Court of United States

October Term, 1996

In re ESTATE OF BOBBY NOAH GRAVEN,
In re ESTATE OF MILLIE ANN GRAVEN, deceased

GRAVEN AUCTION CO., INC.,
GRAVEN REALTY, INC., and
BOBBY F. GRAVEN, Trustee for the
BOBBY N. GRAVEN TRUST

Petitioners,

vs.

RICHARD V. FINK, Trustee

Respondent,

Petition for A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Certiorari should be granted to clarify whether a bankruptcy court can lawfully, under 11 U.S.C. § 1208(d) , convert a chapter 12 case to a chapter 7 case against the will of a family farmer debtor, thereby circumventing the bankruptcy code's prohibition of involuntary chapter 7 case against a family farmer, 11 U.S.C. §§ 303(a) and 1208(e), and then allow the trustee to institute proceedings against non-debtor third parties, such as Petitioners, and whether the conversion and the subsequent chapter 7 proceedings are in violation of 11 U.S.C. §§ 303(a) and 1208(e), and are without proper jurisdiction.

II. Certiorari should be granted because the United States Court of Appeals for the Eighth Circuit has so far departed from and has sanctioned such departure by the lower courts so far from the accepted and usual course of judicial proceedings when said courts had already made their determination that the debtors' transfers to Petitioners were fraudulent conveyances in a proceeding to which Petitioners were not even parties, thereby depriving Petitioners of their constitutional right to due process and to a fair trial on the very issue this adversary proceeding was brought to determine. Such departure calls for an exercise of this Court's supervisory power over the lower courts. Said deprivation was caused by the lower courts' erroneous interpretation of the word "fraud" in 11 U.S.C. § 1208(d) to mean "fraudulent conveyance" and certiorari should be granted to clarify whether a bankruptcy court may, pursuant to 11 U.S.C. § 1208(d), convert a chapter 12 case to chapter 7 upon mere allegation of "fraudulent conveyance."

PARTIES TO THE PROCEEDING

Petitioner Graven Auction Co. Inc., is a Missouri Corporation; Petitioner, Graven Realty, Inc. is a Missouri Corporation; Petitioner, Bobby F. Graven is the trustee for the Bobby Noah Graven Trust, an irrevocable trust set up under the laws of the State of Missouri. Petitioners were the Defendants in the adversary proceeding in the United States Bankruptcy Court for the Western District of Missouri, the court of first instance, and were Appellants before the United States Court of Appeals for the Eighth Circuit. None of the corporate Petitioners has any parent or subsidiary corporations.

Respondent Richard V. Fink is the trustee appointed for the bankruptcy estate of Bobby Noah Graven, an individual and resident of the State of Missouri and an involuntary family farmer debtor under chapter 7 of title 11 of the United States Code, and for the estate of Millie Ann Graven, who is deceased and who was also a resident of the State of Missouri and an involuntary family farmer debtor prior to her death. Respondent was the plaintiff and Appellee in the adversary proceedings prior to this petition.

There are no other parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On September 5, 1995, the United States Court of Appeals for the Eighth Circuit issued its opinion(1a) and judgment(7a), affirming the opinion(40a) and judgment (53a) of the United States District Court for the Western District of Missouri, dated May 9, 1994, which District Court's judgment in turn affirmed the opinion(54a) and judgment(58a) of the United States Bankruptcy Court for the Western District of Missouri, dated respectively October 30, 1992 and November 2, 1992. The Eight Circuit's opinion is published as *In re Graven*, 64 F. 3d 453 (8th Cir. 1995); the district court's opinion is not published but a copy of it is included in the appendix to this petition(40a); the opinion and judgment of the bankruptcy court's are not published but copies of the same are included in the appendix to this petition(54a and 58a).

Also included in the Appendix to this petition are the decisions(69a and 87a) of the United States Court of Appeals for the Eighth Circuit, *In re Graven*, 936 F.2d 378 (8th Cur. 1991)(69a), that of the United States District Court for the Western District of Missouri(89a), and that of the United States Bankruptcy Court for the Western District of Missouri(102a), in the main bankruptcy case of which this adversary proceeding is a part and upon which this adversary proceeding is based.

STATEMENT OF JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit of September 5, 1995(1a and 7a). That judgment affirmed the judgment of the United States District Court for the Western District of Missouri(40a and 53a), which in turn affirmed the decision(54a and 58a) of the United States Bankruptcy Court for the Western District of Missouri. For purpose of this review, the opinion and judgment of the Eighth Circuit dated June 25, 1991(69a and 87a) are also important as the

judgment sought to be reviewed is based on these earlier opinion and judgment. Petitioners also seek review of the Eight Circuit's this latter decision, *In re Graven*, 936 F.2d 378 (8th Cur. 1991) (69a and 87a), as Petitioners were not parties to but their property interest was decided in that case.

On September 18, 1995, Petitioners filed their Petition For Rehearing(8a). On October 10, 1995, the Eighth Circuit denied Petitioners' Petition for Rehearing(25a). Petitioners invoke the certiorari jurisdiction conferred upon this Court by 28 U.S.C. 1254(1).

STATUTES INVOLVED

11 U.S.C. § 1208 provides:

(b) On request of debtor at any time, if the case has not been converted under sections 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(d) On request of a party in interest, and after notice and hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

(e) Notwithstanding any other provision of this section, a case can not be converted to a case under another chapter unless the debtor may be a debtor under such chapter.

11 U.S.C. § 303(a) provides:

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under such chapter under which such case is commenced.

11 U.S.C. § 103 provides:

(a) Except as provided in section 1161 of this title, chapter 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title.

STATEMENT OF THE CASE

The court of first instance is the United States Bankruptcy Court for the Western District of Missouri. The court purported to exercise jurisdiction in the instant case under 28 U.S.C. § 157.[1]

Petitioners were defendants-appellants in this adversary proceedings in the underlying involuntary chapter 7 case against family farmer debtors Bobby Noah Graven and Millie Ann Graven who is now deceased.

On November 12, 1987, Bobby Noah Graven and Millie Ann Graven filed, as family farmers, their petition for relief under chapter 12, "Adjustment of Debts of A Family Farmer With Regular Annual Income," of title 11 of the United States Code. Thereafter on January 29, 1988, the debtors filed a Plan of Reorganization. Some of the creditors objected to the plan. A hearing was scheduled for March 2, 1988 on the plan and the creditors' objections thereto. On March 2, 1988, the trustee filed a Motion for Investigation and the court granted the motion under 11 U.S.C. §§ 1202(b)(2) and 1106. The trustee filed in November of 1988 and January of 1989 respectively "Trustee's Preliminary Investigation Report" and "Trustee's Supplemental Preliminary Investigation Report." In the report, the trustee concluded, citing 11 U.S.C. §§ 544(b) and 426.020, Revised Statutes of Missouri (1986) (hereinafter RSMo), that the debtors transferred property in fraud of their creditors. As a result, the Trustee sought authority from the court to set aside various transfers. The trustee stated in his reports:

> The Court had before it indications that the debtors, prior to instituting these proceedings on November 12, 1987, had transferred various items

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[1] By "purported," Petitioners challenges the bankruptcy court's jurisdiction in the instant case. The grounds of such challenge is laid out later in this petition.

of property. The trustee understood that he was to investigate all transfers by the debtors and the facts and circumstances surrounding the transfers and determine whether there was a basis for claiming that any property transferred should be turned over to the Estate.

. . . .

The trustee believes that the investigation to date has revealed a plan or scheme of the debtors, and particularly debtor Bobby N. Graven, to convey property to hinder delay, or defraud his creditors.

Section 544(b) provides:

> (b) The trustee may avoid any transfer of an interest by the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that this allowable under §502 of this title . . . .

. . . .

Section 426.020 R.S. Mo. provides, in part, as follows:

> Every conveyance or assignment in writing, or otherwise, of any estate or interest in land, or in goods or chattels or in things or actions, or any rents and profits issuing therefrom . . . made or contrived with the intent to hinder, delay, or defraud creditors of his lawful actions, damages, forfeitures, debts, or demands . . . shall be henceforth deemed and taken as against said creditors and purchased prior and subsequent thereto, to be clearly and utterly void."

. . . .

It seems obvious to the trustee that all transfers of real estate, cattle, livestock, farm equipment, promissory notes, contract for deeds, deeds of trust, accounts receivable, shares of stock, and all other property of any kind and type as indicated

> in this report were made with the intent to hinder, delay, and defraud creditors of debtors. The trustee would request the Court to authorize him to proceed to institute proceedings to set aside such transfers, to cause such property to be turned over to the trustee, to cause the parties involved to account to the trustee for property received from debtors and to otherwise authorize the trustee to pursue and obtain possession of all properties transferred by debtors in fraud of creditors. (Emphasis added)

A majority of the transfers sought to be set aside as fraudulent conveyances occurred in 1985-1986.

The bankruptcy court set a hearing for January 24, 1989 to consider the Trustee's reports. On the hearing date the debtors moved both orally and by written application, under 11 U.S.C. § 1208(b), to dismiss their chapter 12 case. The court refused to grant the debtors' application for dismissal immediately.

On February 10, 1989, Respondent trustee and one creditor filed motions to convert Debtors' chapter 12 case to chapter 7. In the alternative, Respondent trustee moved the bankruptcy court to dismiss the chapter 12 case on the condition that the debtors were ordered to pay the administrative expenses incurred up to the time of dismissal. Some of the creditors also requested that the case be dismissed and the debtors not be allowed to file any bankruptcy within 180 days. A hearing on the motions to dismiss or to convert was held on April 10, 1989, at which no witness was called; no examination and cross-examination was conducted. No ruling was made on the hearing date and the bankruptcy court took the case under advisement. Nothing further in terms of evidentiary hearing happened after April 10, 1989.

On May 22, 1989, the bankruptcy court issued its decision (102a or *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989)) granting Respondent trustee's Motion To Convert Case notwithstanding the debtors' request for dismissal and their objection to the conversion and commencement of a chapter 7 case against them. *The conversion was said to be under the authority of 11 U.S.C. § 1208(d) and upon the finding*

that the debtors committed fraud by transferring certain properties to Petitioners with the intent to hinder, delay and defraud their creditors. The court stated that it "freely admits that the view it adopts follows the minority view." In re Graven, 101 B.R. 109, 113 (Bankr. W.D. Mo. 1989). The debtors challenged the conversion on appeal but the judgment of the bankruptcy court was subsequently affirmed by the district court(89a) on March 29, 1990, and by the Court of Appeals for the Eighth Circuit on June 25, 1991. *In re Graven,* 936 F.2d 378 (8th Cir. 1991)(69a and 87a). Two and one half years had passed from the time of the debtors' motion to dismiss to the Eighth Circuit's decision affirming the involuntary conversion. Neither of the Petitioners was a party to the trial and appellate proceedings concerning the propriety of converting the chapter 12 case to a chapter 7 case over the objection of the debtors. The conversion proceedings are hereinafter referred to as *Graven I.*

While the debtors' appeal challenging the conversion was pending in the district court, Respondent trustee initiated this adversary proceeding against, among others, Petitioners. In several counts of the complaint(125a), Respondent trustee sought to void certain transfers made by the debtors to Petitioners as fraudulent conveyances. One count also sought to pierce the corporate veil , Inc. and to have said Petitioners declared alter ego of the debtors.

On October 30, 1992, November 2, 1992, the bankruptcy court, by way of sanctions against debtor Bobby N. Graven alone, rendered its decision(54a and 58a), among other things, finding that the transfers made by the debtors to Petitioners were fraudulent conveyances. The court also declared that "Defendant Bobby N. Graven is and was alter ego of defendants Graven Auction and Graven Realty" and the assets and books of corporate Petitioners are those of debtor Bobby N. Graven and ordered the same be turned over to Respondent trustee. Petitioners appealed from the bankruptcy court's judgment. The judgment was subsequently affirmed by the district court on May 9, 1993(40a).

On appeal to the United States Court of Appeals for the Eighth Circuit, Petitioners raised the issues of whether the lower court improperly converted the chapter 12 case to

chapter 7 against the will of the family farmer debtors. The court refused to consider such issues on the ground that Petitioners did not raise them before the district court and therefore they were not properly before the court. The Eighth Circuit affirmed the judgment of the district court in a published opinion(*In re Graven*, 64 F. 3d 453 (8th Cir. 1995) or 1a).

On September 18, 1995, Petitioners filed their Petition For Rehearing(8a). In their petition, Petitioners requested that the court look at the conversion issue anew in light of 11 U.S.C. §§ 303(a) and 1208(e), which the court had overlooked and/or ignored in rendering its judgment in *Graven I*. It was Petitioners' position that the overlooked statutes raise jurisdictional issues and call into question the legality of the whole bankruptcy proceedings against the debtors as well as Petitioners and that, therefore, the Eighth Circuit should consider these issues even though Petitioners did not raise the same in the district court. On October 10, 1995, the Eighth Circuit denied Petitioners' Petition for Rehearing(25a).

On November 20, 1995, Petitioners filed their Motion to Recall or Stay Mandate Pending Petition For Writ of Certiorari to the United States Supreme Court (26a). Said motion was denied on December 20, 1995(39a).

On or about December 20, 1995, the debtors filed a complaint for independent action for relief from involuntary chapter 7 bankruptcy proceedings, judgments and orders on the ground that the same have been maintained and rendered in violation of 11 U.S.C. §§ 303(a) and 1208(e) and are without proper jurisdiction. Said action is now pending in the United States Bankruptcy Court for the Western District of Missouri.

Unless the mandate of the Eighth Circuit is stayed, Petitioners' assets will be liquidated and they seek the review of this Court.

REASONS FOR GRANTING THE WRIT

1. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A BANKRUPTCY COURT CAN LAWFULLY, UNDER 11 U.S.C. 1208(d), CONVERT A

CHAPTER 12 CASE TO A CHAPTER 7 CASE AGAINST THE WILL OF A FAMILY FARMER DEBTOR, THEREBY CIRCUMVENTING THE BANKRUPTCY CODE'S PROHIBITION OF AN INVOLUNTARY CHAPTER 7 CASE AGAINST A FAMILY FARMER DEBTOR, 11 U.S.C. §§303(a), AND 1208(e), AND THEN ALLOW THE TRUSTEE TO INSTITUTE ADVERSARY PROCEEDING AGAINST NON-DEBTOR THIRD PARTIES, SUCH AS PETITIONERS, AND WHETHER THE CONVERSION AND SUBSEQUENT CHAPTER 7 BANKRUPTCY PROCEEDINGS ARE IN VIOLATION OF 11 U.S.C. §§ 303(a), AND 1208(e) AND ARE WITHOUT PROPER JURISDICTION.

Rule 10(c) of this Court states that certiorari may be granted, at this Court's discretion, if a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court. In the instant case, the Eighth Circuit has decided such an important federal question in *In re Graven*, 936 F.2d 378 (8th Cir. 1991)(69a), and based on that decision, has refused to reverse the district court's judgment, even though Petitioners have pointed out and explained to the court where and why the court made a serious error on an important federal bankruptcy law question concerning the family farmers of this country.

It has been the long-standing policy of this nation that farmers and family farmers are exempt from involuntary liquidation proceedings. Such policy is enacted as the law of this country in 11 U.S.C. §§ 303(a), 1112(c), 1307(e), and, as will be explained later in this petition, in 11 U.S.C. § 1208(e). These statutes provide respectively:

11 U.S.C. § 303(a):

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, or commercial corporation, that may be a debtor under such chapter under which such case is commenced.

11 U.S.C. § 1112(c):

(c)The court may not convert a case under this chapter to case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation unless the debtor requests such conversion.

11 U.S.C. § 1307(e):

(e)The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

In re Lange, 39 B.R. 483, 483-484 (Bankr. D. Kan. 1984), laid out the historical and policy reasons for the bankruptcy code's prohibition of involuntary cases against farmers.

> The legislative history states that farmers are excepted from involuntary filings [under chapter 7] "because of the cyclical nature of their business." (Citation omitted) The reason for the exemption is clear:
>
> > One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him to involuntary bankruptcy. (Citation omitted)
>
> The historical reason farmers have been exempt from involuntary liquidation in bankruptcy goes beyond the cyclical nature of the farming business:
>
> > Examination of the debates in both Houses when the bankruptcy measure [Act of 1898] was pending discloses the frequently expressed purpose to exempt farmers as a class from compulsory proceedings. In assigning reasons for this exemption reference was made to the fact that the property of farmers consists mainly of real estate and permanent fixtures, which can not be removed or concealed, and that encumbrances upon such property are usually matter of public record. Primarily,

> as appears, it was sought to impose involuntary bankruptcy upon traders and middlemen, because of the wider range of their transactions, the convertible nature of their assets, and the inadequacy of state laws to prevent fraud upon their creditors. (Citation omitted)

The issue raised in the instant case is whether the same policy is carried out in chapter 12 of the bankruptcy code.

In *Graven I*, to which Petitioners were not parties, the Eighth Circuit held that under 11 U.S.C. § 1208(d), a bankruptcy court can convert a chapter 12 case to a chapter 7 case upon finding of fraud in connection with the case notwithstanding the family farmer debtor's request for dismissal prior to any finding of fraud and his objection to the conversion. In reaching its decision, the Eighth Circuit overlooked and/or ignored 11 U.S.C. §§ 303(a) and 1208(e) which prohibit an involuntary chapter 7 case against a family farmer, and as a result, the conversion and current chapter 7 proceedings flowing therefrom against the debtors as well as Petitioners are in violation of said statutes.

The statutes involved in the case have been set forth in the section of Statutes Involved. For this Court's convenience, Petitioners will again set them out in full here to show why the Eighth Circuit has committed error on such an important federal bankruptcy law question concerning the plight of family farmers of this country as to call for this Court's intervention.

11 U.S.C. §§ 1208(b) and (d) provide respectively:

> (b) On request of debtor at any time, if the case has not been converted under sections 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.
>
> (d) On request of a party in interest, and after notice and hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

Before going directly to show how the current bankruptcy proceedings against Petitioners and the debtors are in violation of 11 U.S.C. §§ 303(a) and 1208(e), Petitioners would like first to show that the Eighth Circuit committed another serious error in its interpretation and application of 11 U.S.C. § 1208(b) in *Graven I*.

In affirming the conversion in *Graven I*, the Eighth Circuit first ignored the mandatory language of § 1208(b) which requires an immediate dismissal of the chapter 12 case upon a debtor's request. The court held that the bankruptcy court can delay action on a debtor's motion to dismiss upon allegations of fraudulent conveyance awaiting the consideration and decision on trustee's motion to convert. This holding and its underlying reasoning was severely criticized in *In re Davenport*, 175 B.R. 355 (Bankr. E.D. Cal. 1994). There the court held, in a well reasoned opinion, that a family farmer debtor has an "absolute and unqualified right" to dismissal under § 1208(b) notwithstanding a motion to convert under section 1208(d) on allegations of fraud. The court had the following to say about the Eighth Circuit's opinion in *Graven I* at 175 B.R. at 358-59:

> First, *Graven* ignores the plain language of the Code. The interpretation of a statutory provision begins with "the language of the statute itself." *Pennsylvania Public Welfare Dep't V. Davenport*, 495 U.S. 552, 557-58, 109 S.Ct. 2126, 2130, 109 L.Ed.2d 588 (1990) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L. Ed.2d 692 (1985)). If the statutory language is unambiguous, the court does not need to inquire further. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 248, __, 112 S.Ct. 1146, 1149-50, 117 L. Ed.2d 391 (1992). The functional language in section 1208(b) provides that upon the debtor's request for dismissal "at any time" the court "shall" dismiss the case. There is very little room for ambiguity on what this statute means. "At any time" clearly indicates that the debtor may request dismissal at any stage of the proceedings without notice and hearing. "Shall" clearly indicates that the court's dismissal is mandatory.

The *Graven* court's opinion that nothing in this language requires immediate action[on a debtor's motion for voluntary dismissal under section 1208(b)] asks too much specificity from Congress. The language at the very least strongly infers immediate, mandatory action. In addition, the Eighth Circuit's reliance on the Bankruptcy Rules is now inapposite. Since *Graven* was decided, rule 1017(a) was amended to provide that motions under 1208(b) are also excepted from the notice and hearing provisions. Although rule 1017(a) provides that a section 1208(b) request for dismissal is to be accomplished by motion filed and served as required by rule 9013, rule 9013 provides that matters that do not require notice may be submitted ex parte. In any event, to the extent rules promulgated by the Supreme Court abridge or modify a debtor's right as granted by Congress, "the statute must take precedence." *In re Cisneros*, 994 F. 2d 1462, 1465 (9th Cir. 1993); 28 U.S.C. § 2075.

More specifically, to interpret "shall" as "may" thereby giving the court discretion to dismiss, as *Graven* does, is a strained reading. There is perhaps no less ambiguity word used in statutes than "shall." "Shall" implies a command. See *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 819-20, 79 L. Ed. 2d 1566 (1935); see also *United States v. Rogers*, 461 U.S. 677, 706-09, 103 S.Ct. 2132, 2149-51, 76 L. Ed. 2d 236 (1983) . . . Congress used both "may" and "shall" throughout the Code, and the clear inference is that they recognize the import of their word choice. See generally *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428, 430, 91 L. Ed. 436 (1947) ("When 'may' and 'shall' are used in the same rule, the normal inference is that each is used in its usual sense.")

Second, even if the language were not clear, the court is not convinced that principles governing interpretation of ambiguous statutory provisions would support the statutory interpretation in

> *Graven*. . . . See, e.g., *United States V. Ron Pair*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters.'") . . . Indeed, the Eighth Circuit in *Graven* focused on the scant legislative history and general Congressional purpose and intent to provide assistance only to honest debtors and prevent fraud and abuse as authority to ignore the mandatory language of section 1208(b). The court agrees that there is a clear object and policy behind the bankruptcy laws to prevent fraudulent debtors from abusing the protection of the Code, but disagrees that this policy is strong enough to strike "shall" out of section 1208(b) and replace it with "may."
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> Given the clarity of the statutory text, an "exceptionally heavy" burden must be met to prove Congress intended the language to be interpreted otherwise. See *Union Bank v. Wolas*, 502 U.S. 151, ____, 112 S.Ct. 527, 530, 116 L. Ed.2d 514 (1991). . . .

The court in *In re Davenport* focused on the right of a family farmer to have his chapter 12 case dismissed. Although not specifically so stated, the case stands for the proposition that because a family farmer debtor's right to dismissal is "absolute and unqualified", once dismissal occurs, there is no case left to be converted to chapter 7.

Deciding the priority between competing debtor's motion for dismissal and creditors' motion to convert under 11 U.S.C. § 1307, a statute similar to 11 U.S.C § 1208, several courts have held that a debtor under chapter 13 has an absolute right to dismissal upon payment of administrative expenses incurred by the trustee even though the debtor is not a farmer. *In re Harper-Elder*, 184 B.R. 403

(Bankr. D. Dist. Col. 1995); and *In re Looney*, 90 B.R. 217 (Bankr. W.D. Va. 1988).[2]

In *Graven I*, the Eighth Circuit also found a "potential conflict(emphasis added)," to use the Eighth Circuit's own phrase, between subsections (b) and (d) of § 1208. The court resolved that "potential conflict" in favor of subsection (d) and affirmed the order of conversion, which affirming gave the green light to Respondent trustee to go forward with this adversary proceedings against Petitioners.

To begin with, there is no real conflict between §§ 1208(b) and 1208(d). The two subsections are in harmony rather than in conflict because the latter allows conversion only where the debtor has not requested for dismissal or does not object to conversion, but where the debtor has requested for dismissal or objects to the conversion, section 1208(b) mandates a dismissal. The Eighth Circuit's affirming the conversion in *Graven I* based on a "potential conflict" shows, if nothing more, lack of careful consideration.

In *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 278-79, 61 S.Ct. 196, 199-200, 85 L. Ed. 184 (1940), this Court, stated that the bankruptcy code is to be liberally construed to give the debtor the full measure of relief afforded by Congress. Ambiguities are to be resolved in favor of the debtor. See also *In re Mahffey* , 129 F.2d 292 (2d Cir. 1942). If the conflict is merely potential, the benefit of the doubt should be given to the family farmer debtor. Accordingly, the debtors' request for dismissal should have been granted.

The above reading of 11 U.S.C. §§ 1208(b) and 1208(d) as containing no conflict is consistent with 11 U.S.C. §§ 303(a) and 1208(e) which embody the Congress' intent of prohibiting involuntary chapter 7 cases against family farmers. It is against these statutes, the Eighth Circuit committed the most serious error which took away the protection Congress gave to family farmers against involuntary chapter 7 proceedings. And it is this most

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[2]The cases which gave precedence to a debtor's right to dismissal fully recognize the voluntary nature of a chapters 12 and 13 cases.

serious error that requires this court's intervention. Section 303(a) provides:

> (a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, *except* a farmer, *family farmer*, or a corporation that is not a moneyed, or commercial corporation, that may be a debtor under such chapter under which such case is commenced. (Emphasis added)

While 11 U.S.C. § 303(a) speaks of "commencement" of an involuntary chapter 7 case, the spirit of the statute is that there can be no involuntary chapter 7 case against family farmers. [3] The focus of the prohibition in section 303(a) is on "involuntary case," not "commencement." To say that section 303(a) prohibits the "commencement" of an involuntary chapter 7 case against a family farmer but allows involuntary conversion of a chapter 12 case to chapter 7 is to elevate form over substance because conversion is the ending of a chapter 12 case and the start or commencement of a chapter 7 case.

In *Matter of Rementer*, 58 B.R. 723, 724 (Bankr. D. Del. 1986), the court stated that section 1307(e), a statute similar to § 1208(e), "reinforces and works in conjunction with § 303(a) which proscribes involuntary relief of any kind against a farmer."

In *In re Mandalay Shores*, 62 B.R. 758, 760 (Bankr. M.D. Fla. 1986), a case involving a chapter 11 debtor that was not a "moneyed business or commercial corporation," the court had the following to say:

> Without going into any details of this aborted Chapter 11 case, it shall suffice to state that on October 25, 1985, this Court entered an Order and dismissed this Chapter 11 case after almost five years of frustration and repeated unsuccessful attempts by the Debtor to obtain confirmation of its several plans of reorganization. Ordinarily, this

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[3]Note that in section 303(a) Congress made no exception of any kind, fraud or fraudulent conveyance, to the prohibition of involuntary chapter 7 cases against family farmers.

> turn of events might have resulted in a conversion of this Chapter 11 case to a liquidation case under chapter 7 inasmuch as the Debtor has almost $2,000,000 in cash on deposit. *However because the Debtor is not a monied business or commercial corporation, it was not eligible to be an involuntary debtor under Chapter 7 by virtue of § 303(a) of the Bankruptcy Code, and because it was unwilling to convert this Court had no choice but to enter an order of dismissal when the last Plan of Reorganization failed to obtain confirmation.* (Emphasis added)

"Family farmer" is included, together with those that are not "monied, business or commercial corporation," in § 303(a). The holding and statement of the *Mandalay Shores* court applies perfectly in the instant case to prohibit involuntary conversion of a chapter 12 case to chapter 7.

11 U.S.C. § 103(a) provides that "[e]xcept as provided in section 1161 of this title, chapter 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title." Thus, 11 U.S.C. § 303(a) is a general provision and the policy embodied therein prohibiting involuntary chapter 7 cases against family farmers can not be ignored in deciding whether a bankruptcy court can convert a chapter 12 case to chapter 7 against the will of a family farmer debtor. But the Eighth Circuit and the lower courts totally ignored and/or overlooked 11 U.S.C. § 303(a) in *Graven I. Nowhere in any of the opinions rendered by said courts in this bankruptcy case thus far was 11 U.S.C. § 303(a) ever mentioned or cited.*

Petitioners would particularly like to call to this Court's attention the fact that Congress amended § 303(a) by adding the reference to "family farmer" in October of 1986, the same time when chapter 12 was enacted, to make sure that family farmers would not be subjected to an involuntary chapter 7 case. See legislative history following 11 U.S.C. § 303 in United States Code Annotated(U.S.C.A.). For a general discussion of Chapter 12 of title 11, see Steve Shapiro, Comment, *An Analysis of the Family Farmer Bankruptcy Act of 1986,* 15 Hofstra L. Rev. 353 (1987).

The prohibition of 11 U.S.C. § 303(a) and of the bankruptcy code against an involuntary chapter 7 case

against family farmers is carried further into chapter 12 by 11 U.S.C. § 1208(e), in anticipation of the situation where a creditor attempts to convert a chapter 12 case to chapter 7 against the will of a family farmer. Section 1208(e) provides:

> Notwithstanding any other provision of this section[including subsection (d) on fraud], a case can not be converted to a case under another chapter unless the debtor may be a debtor under such chapter.

Section 1208(e) makes it very clear that notwithstanding any finding of fraud under § 1208(d), a bankruptcy court can not convert a chapter 12 case to a case under another chapter if the family farmer debtor may not be a debtor under such chapter. By reason of the bankruptcy code's prohibition against involuntary chapter 7 cases against family farmers, a family farmer may not be a debtor under chapter 7 if he opposes a chapter 7 case. Therefore, involuntary conversion of chapter 12 case to chapter 7 is prohibited by 11 U.S.C. § 1208(e).

This interpretation of 11 U.S.C. § 1208(e) is the only logical reading of the statute. Chapter 12 is enacted for adjustment of debts of a family farmer with regular annual income. Under 11 U.S.C. § 109(b), any person may be a debtor under chapter 7 except when such person is a railroad, a domestic or foreign insurance company or banking institution. These institutions are not, nor can they be "family farmers" as defined in 11 U.S.C. § 101(18)(154a). On the other hand, a family farmer automatically qualifies as a debtor under chapter 7 if he does not oppose to chapter 7 proceeding against him. Thus, when section 1208(e) says that notwithstanding any other provision of this section including subsection (d) on fraud, a case can not be converted to chapter 7 unless the debtor may be a debtor under such chapter, it must mean that a family farmer may not be a debtor under chapter 7. And a family farmer may not be a debtor under chapter 7 if he opposes the chapter 7 case against him. Therefore, unless section 1208(e) is construed to prohibit conversion to chapter 7 against unwilling family farmers, the statute would be meaningless.

No federal courts have ever passed upon the interaction between §§ 1208(b), (d), (e) and 303(a). In

Graven I, the Eighth Circuit considered the interaction between 11 U.S.C. §§ 1208(b) and (d) and found that there existed a "potential conflict," *In re Graven*, 936 F. 2d at 384-387, but failed to consider the interactions between and ignored the clear meaning of §§ 303(a) and 1208(b) and (e). As result of that failure, the Eighth Circuit in *Graven I* took away the protection Congress gave, in the 1986 enactment of chapter 12 of title 11, to family farmers against involuntary chapter 7 proceedings.

Although no other federal courts have considered the interaction between 11 U.S.C. §§ 1208(b), (d), (e) and 303(a), the Seventh Circuit has stated that a farmer or family farmer can not be made a subject of an involuntary chapter 11 case. *Matter of Armstrong*, 812 F. 2d 1024, 1027, and 1030 (7th Cir. 1987). In addition, several bankruptcy courts have held that a farmer not already in bankruptcy proceeding can not be liquidated against his will and that a farmer in chapter 11 proceeding can not be liquidated against his will by conversion to chapter 7. *In re Lange*, 39 B.R. 483, 484 (Bankr. D. Kan. 1984); *In re Besler*, 19 B.R. 879 (Bankr. D.S.D. 1982); and *In re Kehn Ranch, Inc.*, 41 B.R. 832, 833 (Bankr. D.S.D. 1984). These cases faithfully carried out Congress' intention that farmers and family farmers are not to be subjected to involuntary chapter 7 and 11 cases.

It is important to note that involuntary conversion of a chapter 13 case to chapter 7 allows creditors to avoid compliance with the involuntary petition provisions of 11 U.S.C. § 303 and is unfair to the non-farmer debtor and contrary to the spirit of the bankruptcy code. *In re Harper-Elder*, 184 B.R. at 408. In the case of a family farmer debtor under chapter 12, involuntary conversion also allows the trustee and creditors to do indirectly what they can not do directly because of 11 U.S.C. § 303(a). See *In re Lange*, 39 B.R. 483, 486 (Bankr. D. Kan. 1984) (involving a farmer debtor).

Petitioners would also like to point out to this Court the erroneous and flawed reasoning of the Eighth Circuit in *Graven I*, particularly in light of the Eighth Circuit's misquoting this Court's opinion in *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991). Quoting this Court, the Eighth Circuit made the following statements:

> The purpose of the bankruptcy code is to provide a fresh start for insolvent debtors. *Grogan v. Garner*, __ U.S. __, 111 S. Ct. 654, 659, 112 L. Ed.2d 755 (1991). The opportunity for a completely unencumbered new beginning, however, is not available to all, but is limited to the "honest, but unfortunate debtor." *Id.* 11 S.Ct. at 659 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L. Ed. 1230 (1934).
>
> The Supreme Court's statements make clear that the purpose of the bankruptcy code is to protect honest debtor, not to provide a shield for those who exploit the code's protection then escape judicial authority when their fraudulent schemes are exposed.

In re Graven, 936 F. 2d at 385.

First of all, the statements of this Court, which was cited by the Eighth Circuit, had nothing to do with conversion or forcing a debtor into a bankruptcy proceeding. It dealt with discharge of debts in bankruptcy. Secondly, in seeking dismissal of their chapter 12 case, the debtors in *Graven I* did not seek a fresh or "completely unencumbered new beginning" because in requesting the dismissal of their chapter 12 case, the debtors sought no discharge of any part of their debts, nor could they escape "judicial authority" because the creditors could still sue and collect from the debtors and alleged transferees of fraudulent conveyances in appropriate state courts. A family farmer debtor does not benefit in a real sense nor are creditors harmed by such a dismissal. See *In re Harper-Elder*, 184 B.R. 403, 407 (Bankr. D. Dist. Col. 1995). By dismissing the case, the debtor indicates that he is prepared to limit his rights and remedies to those available in state court. *Id.* This is particular so when one considers that a bankruptcy court is not a forum best suited for jury trial of fraudulent conveyance claims.

It is also very important for Petitioners to point out to this Court that the Eighth Circuit and the lower courts have treated 11 U.S.C. § 1208(d) as a penal provision for fraudulent conveyance. The penalty being prescribed for fraudulent conveyance by the Eighth Circuit is forced liquidation of a family farmer debtor's assets. The Eighth

Circuit made this very clear when it stated in its opinion in this adversary proceeding: "In *Graven I*, the issue was whether under section 1208(d) the Gravens engaged in fraudulent activity that would justify converting the case from chapter 12 to chapter 7." This approach is totally unwarranted. If by first filing the chapter 12 case and then seeking a voluntary dismissal, a debtor has unfairly taken advantage of the automatic stay incidental to the filing of the chapter 12 bankruptcy case, the bankruptcy code has already provided a penalty in 11 U.S.C. §109(e) which prohibits the family farmer debtor from filing any kind of bankruptcy within 180 days of the dismissal. Further, a bankruptcy court could, as suggested in *In re Davenport*, 175 B.R. at 361-62, fashion appropriate sanctions other than forced liquidation against the debtors. See also *In re Harper-Elder*, 184 B.R. at 406-07. Petitioners submit that the penalty of forced liquidation was not, neither could it be Congress' intention and that such penalty is wholly disproportionate to the "offense." As the court in *In re Harper-Elder*, 184 B.R. at 406, stated that "absent support in the plain language, the court has no authority to tinker with the bankruptcy laws. Simply because the courts are concerned about abuse is not an excuse to rewrite the statute." A bankruptcy court could not be allowed to have the formidable power to force a family farmer debtor into liquidation by way of conversion where the court could otherwise sanction the debtor for fraud, if any, unless there is no doubt that Congress gave that power to it. Not only is forced liquidation disproportionate to any "fraud" or "fraudulent conveyance", it also violates the bankruptcy code's prohibition of involuntary chapter 7 cases against family farmers. 11 U.S.C. §§ 303(a) and 1208(e).

It should also be noted that the Eighth Circuit and the lower courts have demonstrated in *Graven I* an unwarranted view of economics in regards to dismissal and forced liquidation. Said courts saw forced liquidation not only as a punishment for fraudulent conveyance but also as a better solution to the problem between a debtor and a creditor. They would rather liquidate a debtor's assets than allow the debtor and his creditors to work out the debt problem even though some of the creditors might prefer a dismissal and would like to give the debtor more time to pay off the debt,

or to settle with the debtor, or to collect their debts through state court proceedings. This view of economics was demonstrated clearly by the courts' choice of forced liquidation over dismissal and taxing the administrative expenses to the debtors, which was seen by some creditors as superior to forced liquidation and by Respondent trustee as an alternative to conversion. Petitioners must submit that a court must remain neutral on such matters and in case of doubt or where is a difference of opinion, forced liquidation is the last choice. The consequences of this biased view of economics is this forced liquidation proceeding where the only one who has benefited to this date is Respondent trustee and his attorneys and the real parties in interest, the debtors and their creditors, have all been badly hurt by the protracted litigation which has lasted for almost 7 years.

One might question why should Petitioners be allowed to litigate or raise an issue that has been decided in *Graven I*. The answer to it is two fold: (1) This adversary proceeding against Petitioners is based on *Graven I*, and is part of the involuntary chapter 7 proceeding started in *Graven I*; (2) On the other hand, Petitioners were not parties to *Graven I* and therefore did not have an opportunity to raise and litigate the issue. Therefore, Petitioners should be allowed to raise this issue. More importantly, if the conversion in *Graven I* was in violation of 11 U.S.C. §§ 303(a) and 1208(b) and (e), then this adversary proceeding has been and is being maintained in violation of said statutes and without proper jurisdiction and, therefore, must be dismissed.

Petitioners recognize the debtors also have a right to challenge the current involuntary chapter 7 liquidation proceeding against them. In this regard, the debtors have filed in the United States Bankruptcy Court for the Western District of Missouri an independent action, as authorized by Rule 60(b) of the Federal Rules of Civil Procedure, for relief from bankruptcy proceedings, judgments, and orders based on this very same issue now being raised by Petitioners. A copy of the complaint for the independent action is included in the Appendix to this petition(118a).

In addition, Petitioners submit that the involuntary conversion raises a jurisdictional issue. If the initial

conversion of the debtors' chapter 12 case to chapter 7 was in violation of 11 U.S.C. §§ 303(a) and 1208(b) and (e), then there could not be a chapter 7 or any case under title 11. Consequently, the bankruptcy court did not and does not have jurisdiction to decide whether the conveyances by the debtors to Petitioners were fraudulent. Because it raises a jurisdictional issue, Petitioners could raise it at any time of the proceeding. *Glidden Company v. Zdanok*, 370 U.S. 530, 535-536, 82 S.Ct. 1459, 1464-1465(1962). Any claim based on fraudulent conveyance should be litigated in the appropriate state court rather than in the bankruptcy court.

For the foregoing reasons, Petitioners submit that certiorari should be granted to determine whether the involuntary conversion against the family farmer debtors in *Graven I* and the subsequent involuntary chapter 7 proceedings were and are in violation of 11 U.S.C. §§ 303(a) and 1208(e) and were and are without proper jurisdiction; and whether the Eighth Circuit, in so converting, took away the protection Congress gave to family farmers against involuntary chapter 7 liquidation proceedings.

2. CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM AND HAS SANCTIONED A DEPARTURE BY THE LOWER COURTS SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN SAID COURTS HAD ALREADY MADE THEIR DETERMINATION THAT THE DEBTORS' TRANSFERS TO PETITIONERS WERE FRAUDULENT CONVEYANCES IN A PROCEEDING TO WHICH PETITIONERS WERE NOT EVEN PARTIES, THEREBY DEPRIVING PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO A FAIR TRIAL ON THE VERY ISSUE THIS ADVERSARY PROCEEDING WAS BROUGHT TO DETERMINE. SUCH DEPARTURE CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER OVER THE LOWER COURTS. SAID DEPRIVATION OF DUE PROCESS AND FAIR TRIAL WAS CAUSED BY THE EIGHTH CIRCUIT'S AND THE LOWER COURTS'

ERRONEOUS INTERPRETATION OF THE WORD "FRAUD" IN 11 U.S.C. § 1208(d) TO MEAN "FRAUDULENT CONVEYANCE" AND CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A BANKRUPTCY COURT MAY, PURSUANT TO 11 U.S.C. § 1208(d), CONVERT A CHAPTER 12 CASE TO CHAPTER 7 UPON MERE ALLEGATION OF FRAUDULENT CONVEYANCE.

Rule 10(a) of the Supreme Court Rules states that this Court may grant certiorari at its discretion in a case where a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power over the lower courts. Petitioners respectfully submit that the Eighth Circuit and the lower courts have so far departed from the accepted and usual course of judicial proceedings in this bankruptcy proceeding in that long before the trial of this adversary proceeding to have the debtors' transfers to Petitioners declared void as fraudulent conveyances, said courts had already made their determination that the transfers were fraudulent in *Graven I* to which Petitioners were not even parties.

The prejudgment of the very issue of whether the conveyances by the debtors to Petitioners were fraudulent by the Eighth Circuit is clearly demonstrated by the court's own opinion in this adversary proceeding:

> The bankruptcy court converted the case to chapter 7, concluding that the Gravens had acted with the intent to "hinder, delay, and defraud" their creditor. The district court affirmed and we affirmed as well. We concluded that the evidence abundantly supported the bankruptcy court's finding of fraud.
>
> Moreover, in our view, this case involves the same facts and the same legal standards involved in *Graven I*. While the bankruptcy code sections involved in the two cases are different -- in *Graven I*, the issue was whether under section 1208(d) the Gravens engaged in fraudulent activity

> that would justify converting the case from chapter 12 to chapter 7, and in this case, the trustee seeks to recover fraudulent transfers under either section 548(a) or section 544(b)-- the governing legal standards are identical. *In Graven I*, we looked to the legal standards for fraudulent conveyances under section 548(a) (1) and under Missouri law (applicable under section 544(b))(footnote omitted) to determine whether the Gravens had engaged in fraudulent activity for the purpose of section 1208(d). Both section 548(a) and Missouri law define fraudulent conveyances as those conveyances made with the "intent to hinder, delay or defraud creditors." (Emphasis added)
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> *In Graven I*, we concluded that the evidence abundantly supported the lower courts' conclusions that the Gravens made the transfers with the "intent to hinder, delay or defraud" their creditors and that there was no error in converting the case from chapter 12 to chapter 7. 936 F. 2d at 383-84. The findings of fraud in *Graven I* applied to the transfers from the Gravens to Graven Auction and Graven Realty, as well as to the transfers from the Graven Auction and Graven Realty to the Bobby N. Graven Trust.(Emphasis added)[4]
>
> The bankruptcy judge, who we affirmed in *Graven I*, reached the same conclusion in this case after reviewing the same facts and the same legal standards . . . . Thus, we conclude that *Graven I* is controlling authority in this case, and we affirm the findings and conclusions of the lower courts.(Emphasis added)

In re Graven, 64 F. 3d at 454-56 or 5a-6a.

The district court had also prejudged the issue concerning Petitioners in *Graven I*. Apparently referring to *Graven I*, the district court had the following to say in its

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[4]This is a clear misstatement of the facts because Petitioners Graven Auction and Graven Realty never made any transfers to the Bobby N. Graven Trust.

opinion concerning this adversary proceeding: "As to . . . the transfers of property to Graven Auction, . . . Judge Koger did find proof of actual fraud. The district court affirmed this finding, as did the Eighth Circuit Court of Appeals." (48a)

Neither is there any doubt that the lower courts in *Graven I* had concluded that transfers by the debtors to Petitioners were fraudulent conveyances. Citing 11 U.S.C. § 544(b) and § 428.020 RSMo, the district court in *Graven I* stated:

> The conclusion of the Bankruptcy Court that the debtors committed fraud in connection with the case is largely based upon its finding that the debtors conveyed their property with the intent to hinder, delay, or defraud their creditors.

(95a). Continued the district court at 97a of its opinion in *Graven I:*

> Upon reviewing the record, the Court finds that the Bankruptcy Court's determination that the transfers of property were made with the intent to hinder, delay or defraud creditors in violation of the U.S. Bankruptcy Code and Missouri state law is not clearly erroneous.

The prejudgment by the courts in the end also created some problems for the bankruptcy court itself in this adversary proceeding. Relying on the principle of collateral estoppel and the courts' decisions in *Graven I,* Respondent trustee attempted to obtain a summary judgment in this adversary proceeding against Petitioners on the issue of whether the conveyances by the debtors to Petitioners were fraudulent. In ruling on the summary judgment motion, the bankruptcy court had the following to say:

> [T]he court specifically found [in *Graven I*] the identical element required under the statutes [11 U.S.C. §§ 548(a), 727(a) and § 428.020 RSMo.] at issue in this action . . . .
>
> The court may grant Trustee's motion for summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."

> . . . The trustee cannot use the doctrine of collateral estoppel to satisfy the element of intent to hinder, delay, or defraud creditors. *The element of intent [to hinder, delay, or defraud] is a factual issue, therefore, there exist a factual dispute as to the element in Counts I, III and IX which are based on Mo Rev, Stat. 428.020 and §§ 548 (a) (1) and 727 (a) (2) of the Bankruptcy Code.* (Emphasis added)
>
> As to Count II, that count requests turnover of the subject property under § 524(a). The effect of § 542(a) is to compel those in possession of estate property to turn over such property to the trustee. (citation omitted) This count depends upon a finding in Count I that the subject property transfers were void under Mo. Rev. Stat. 428.020. Because the court can not grant Trustee's motion as to Count I, *there exists a factual issue as to whether the subject property is property of the estate.* (Emphasis added)

(117a). One can not help but ask: How could the bankruptcy court have found fraud or fraudulent conveyance with respect to the debtors' transferors in *Graven I* when it said later in the above-quoted paragraph that there was a factual issue with respect to the intent of the debtor to hinder, delay or defraud their creditors in making the transfers?[5] The answer to the question is either that there was no actual finding of fraud in *Graven I* or that, as will be explained immediately below, the court could not have made a finding of fraudulent conveyance or fraud in *Graven I*.

The purpose of this adversary proceeding is to have the transfers set aside as fraudulent conveyances. The determination of fraudulent conveyance could not be final until the completion of this adversary proceeding. Strangely

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[5] To say that the bankruptcy court did not find fraudulent conveyances in *Graven I* is to ignore the obvious. Note the bankruptcy court attached to its published memorandum opinion a detailed list of the transfers made by the debtors to Petitioners and relied much on those transfers in reaching the conclusion that the debtors committed fraud in connection with the case. *In re Graven*, 101 B.R. at 113 or 111a.

enough, the Eighth Circuit and lower courts had fixed their opinion on the very same issue in *Graven I* and prior to the institution of this adversary proceeding. The Eighth Circuit and the lower courts had entrapped themselves in the determination made in *Graven I*, and it was impossible for the courts to make any determination in this adversary proceeding that would be contrary to *Graven I*. The prejudgment by the Eighth Circuit and the lower courts in *Graven I* had made the instant adversary proceeding wholly unnecessary. The property interests of Petitioners, as entities legally separate from the debtors, had already been determined in *Graven I* to which they were not even made parties. The legal issues concerning them had already been prejudged. Petitioners were thus deprived of their constitutional right to due process and to a fair and impartial trial. This is highly unusual and irregular. In prejudging the very issue concerning Petitioners in *Graven I* to which Petitioners were not made parties, the Eighth Circuit and lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power over the lower courts.

Petitioners would like to go further to point out that the irregularity and unusualness of the proceedings and the prejudgment by the courts was caused by the lower courts' erroneous interpretation of the word "fraud" in 11 U.S.C. §1208(d) to mean "fraudulent conveyance." Petitioners submit that "fraud" and "fraudulent conveyance" are two distinct legal concepts. As stated by the Missouri Supreme Court in *Citizens Bank of Hayti v. McElvin*, 219 S.W. 75, 77(Mo. 1919), the fraudulent conveyance statutes look more to the effect of a conveyance than to any fraudulent intent on the part of the transferor.

11 U.S.C. § 1208(d) uses the word "fraud" rather than "fraudulent conveyance". Had Congress intended to allow conversion upon mere allegations of fraudulent conveyance, it would have so stated. The statute must be given its plain meaning.

It is also important to note that the power of a bankruptcy trustee to avoid fraudulent conveyances under 11 U.S.C. §§ 548 and 544 is premised on the existence of a

case under title 11, the trustee can not and should not be allowed to use that power to "create" a case that otherwise did not exist or can be had. This is exactly what the Eighth Circuit and the lower courts allowed Respondent trustee to do in *Graven I*. In so doing, the Eighth Circuit in *Graven I* set a dangerous precedent that gives the power to a bankruptcy court to convert a case under section 1208(d) upon mere allegations of fraudulent conveyance. It calls for this Court's intervention to clarify whether the Eighth Circuit correctly construed 11 U.S.C. § 1208(d). In distinguishing between "fraud" and "fraudulent conveyance," Petitioners merely attempts to show why and how the lower courts has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

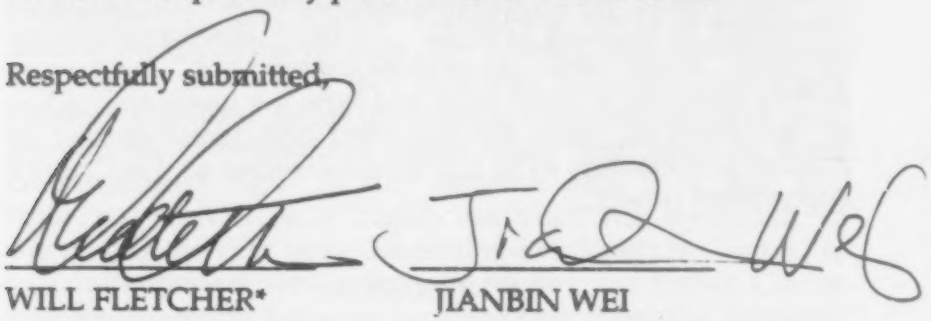
CONCLUSION

In the larger picture, this case raises a very important federal bankruptcy law question concerning the family farmers of this country: Whether a family farmer debtor's chapter 12 case can be involuntarily converted to a chapter 7 liquidation proceeding. The lower courts have answered the question in the affirmative notwithstanding 11 U.S.C. §§ 303(a) and 1208(e) point to the contrary, thereby taking away the protection Congress gave to family farmers against involuntary chapter 7 liquidation proceedings and allowing creditors, in the instant case the trustee and one creditor, to do indirectly what they can not do directly. This case also raises the issue whether a bankruptcy court can, without violating 11 U.S.C. §§ 303(a) and 1208(e), proceed, after involuntary conversion, to liquidate an unwilling family farmer debtor's assets. 11 U.S.C. § 303(a) also calls into serious question the jurisdiction and power of a bankruptcy court to proceed to liquidate an unwilling family farmer debtor's assets. The highest court of the land should grant certiorari to resolve the these issues and to restore the protection Congress gave to family farmers against involuntary chapter 7 liquidation proceedings.

In the smaller picture concerning Petitioners, Petitioners respectfully submit that this adversary proceeding, which is based on the involuntary conversion,

has been instituted and maintained in violation of the above-mentioned statutes. In addition, the Eighth Circuit and the lower courts have deprived Petitioners of their constitutional right to due process and to a fair and impartial trial by prejudging the very same issue in a proceeding to which Petitioners were not parties. This is a departure so far from the accepted and usual course of judicial proceedings that it calls for this Honorable Court to issue a writ of certiorari to exercise its supervisory power over the lower courts.

Respectfully submitted,



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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 5, 1995

No. 94-2446

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Estate of Bobby Noah Graven, In re: Estate of Millie Ann Graven, Deceased,

RICHARD V. FINK, Trustee,

Plaintiff-Appellee,

v.

GRAVEN AUCTION COMPANY, INC., et al.,

Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Missouri

Decided and Filed September 5, 1995

Before: MAGILL and HANSEN, Circuit Judges, and Strom*, District Judge.

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* The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

Appendix A

HANSEN, Circuit Judge. The defendants appeal the district court's[1] order affirming the bankruptcy court's[2] order to set aside as fraudulent conveyances transfers the debtor, Bobby N. Graven, made to the defendants. The defendants assert that the findings of the lower courts were clearly erroneous. We affirm.

I.

We have previously discussed the vast majority of the relevant facts. *Graven v. Fink*, 836 F.2d 378, 380–82 (8th Cir. 1991). We repeat only the facts and background particular to this dispute. Bobby N. and Millie Graven filed a chapter 12 (family farmer reorganization) bankruptcy in November 1987. Prior to filing for bankruptcy, the Gravens transferred a substantial portion of their assets to two companies, Graven Auction and Graven Realty (both controlled by Bobby N. Graven), for little or no consideration. Graven Auction and Graven Realty subsequently conveyed many of those assets to the Bobby N. Graven Irrevocable Trust.

After a creditor made allegations of fraud, the bankruptcy court ordered the chapter 12 trustee to investigate the transfers and to file a report. The trustee eventually filed two reports, concluding that the Gravens had transferred property with the intent to "hinder, delay, and defraud" their creditors. The trustee also recommended filing fraudulent transfer actions to recover the property.

At a hearing on the trustee's reports, the Gravens moved to dismiss the chapter 12 case voluntarily. Based on the Gravens'

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[1]The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri.

[2]The Honorable Frank W. Koger, Chief Judge, United States Bankruptcy Court for the Western District of Missouri.

fraudulent activity, the trustee filed a motion to convert the case from chapter 12 to chapter 7, concluding that the Cravens had acted with the intent to "hinder, delay, and defraud" their creditors. The district court affirmed and we affirmed as well. We concluded that the evidence abundantly supported the bankruptcy court's finding of fraud. We also concluded that the bankruptcy court committed no error in waiting to act on the Graven's motion to dismiss until the trustee completed the fraud investigation.

The trustee subsequently filed a complaint against the defendants in this case — Graven Auction, Graven Realty, and Bobby F. Graven, as trustee of the Bobby N. Graven Irrevocable Trust — seeking the return of the fraudulently transferred property and seeking a declaration that Graven Auction and Graven Realty both functioned as the alter ego of Bobby N. Graven. The bankruptcy court entered judgment for the trustee, it ordered the defendants to return the fraudulently transferred property, and further ordered Graven Auction and Graven Realty, as alter egos of Bobby N. Graven, to turn over their assets and books to Bobby N. Graven's bankruptcy estate.[3]

The defendants appealed to the district court. They raised four appeal points — two relating to the alter ego determination and two dealing with the fraudulent transfer findings. The district court affirmed in full, finding that the alter ego determination was not clearly erroneous and that the evidence fully supported the bankruptcy court's conclusion that the transfers were based upon actual fraudulent intent of the debtor. The defendants appeal.

II.

The defendants have presented six issues on appeal: (1)

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[3]The order also granted the trustee's request to deny the Gravens' chapter 7 discharge based on the fraud.

Appendix A

Whether the district court erred in affirming the bankruptcy court's determination that the trustee proved fraud; (2) Whether the district court erred in affirming the judgment which was not "clear, definite, and certain"; (3) Whether the district court erred in affirming the judgment of the bankruptcy court converting the case from chapter 12 to chapter 7; (4) Whether the district court erred in affirming the bankruptcy court's denial of the Gravens' motion to dismiss the chapter 12 proceeding; (5) Whether the district court erred in affirming the bankruptcy court's finding that the transfers of assets from the Gravens to Graven Realty and Graven Auction were fraudulent transfers; and (6) Whether the district court erred in affirming the bankruptcy court's finding that transfers of stock from Graven Realty and Graven Auction to the Bobby N. Graven Irrevocable Trust were fraudulent transfers.

The defendants did not raise issues 2, 3, and 4 before the district court, and accordingly, those issues are not properly before this court here on appeal. *Dicken v. Ashcroft,*972 F.2d 231, 234 (8th Cir. 1992)[4] Thus, the only issues the defendants have preserved for review are those relating to the fraudulent transfers.

"A finding of fraud under the bankruptcy code is, we believe, a factual matter." *Graven I,* 936 F.2d at 382. Here, the bankruptcy court and the district court both found that the facts established fraud. Normally, such concurrent findings bring into play the "two–court rule" under which we "will not review concurrent findings of fact by two lower courts absent a 'very

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[4]We also note that issues 3 and 4 were precisely the issues we examined in *Graven I.* While the doctrine of collateral estoppel might bar the defendants, who had a chance to litigate the issues in that case from relitigating the issues raised in the first appeal, we need not look to collateral estoppel because the issues were not brought before the district court and, therefore, are not properly before this court.

obvious and exceptional showing of error.'" *Judge v. Production Credit Ass'n of the Midlands*, 969 F.2d 699, 700 (8th Cir. 1992) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). Because the defendants have not made a "very obvious and exceptional showing of error," we need not review the defendants' arguments.

Moreover, in our view, this case involves the same facts and the same legal standard involved in *Graven I*. While the bankruptcy code sections involved in the two cases are different — in *Graven I* the issue was whether under section 1208(d) the Gravens engaged in fraudulent activity that would justify converting the case from chapter 12 to chapter 7, and in this case the trustee seeks to recover fraudulent transfers under either section 548(a) or section 544(b) — the governing legal standards are identical. In *Graven I* we looked to the legal standards for fraudulent conveyances under section 548(a) (1) and under Missouri law (applicable under section 544(b))[5] to determine whether the Gravens had engaged in fraudulent activity for the purposes of section 1208(d). Both section 548(a) and Missouri law define fraudulent conveyances as those conveyances made with the "intent to hinder, delay or defraud" creditors.

In *Graven I,* we concluded that the evidence abundantly supported the lower courts' conclusions that the Gravens made the

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[5]Section 544(b) empowers the trustee to avoid transfers that are fraudulent and avoidable by an existing unsecured creditor under state law. Section 544(b) applies if an unsecured creditor existed at the time the transfer was made. If an unsecured creditor existed when the transfer was made, section 544 may allow the trustee to reach back to transfers made more than one year before the bankruptcy filing, because the statute of limitations from the state or applicable nonbankruptcy law applies and may allow the avoidance of transfers more than one year old.

transfers with the "intent to hinder, delay or defraud" their creditors and that there was no error in converting the case from chapter 12 to chapter 7. 936 F.2d at 383–84. The findings of fraud in *Graven I* applied to the transfers from the Gravens to Graven Auction and Graven Realty, as well as to the transfers from Graven Auction and Graven Realty to the Bobby N. Graven Trust.

The bankruptcy judge, who we affirmed in *Graven I*, reached the same conclusion in this case after reviewing the same facts and applying the same legal standards. The defendants have not attempted to distinguish this case from *Graven I*, nor have they even discussed *Graven I*. Thus, we conclude that *Graven I* is controlling authority in this case, and we affirm the findings and conclusions of the lower courts.

III.

The final issue we must address is the trustee's request for sanctions against the defendants for a frivolous appeal. The decision to impose sanctions for a frivolous appeal is left to our discretion. *See* Fed. R. App. P. 38 ("If a court of appeals determines that an appeal is frivolous, it may. . . award just damages"); *see also* 28 U.S.C. § 1912 (where a court of appeals affirms a judgment "the court in its discretion may adjudge to the prevailing party just damages"). While this appeal closely borders on the frivolous, we exercise our discretion by declining to impose sanctions.

IV.

We affirm the judgment of the district court in full, and we deny the trustee's motion for sanctions.

A True Copy.
Attest:
s/Michael E. Gans
Clerk

APPENDIX B — JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 5, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3204-CV-S-5

In re: Estate of Bobby Noah Graven, In re: Estate of Millie Ann Graven, Deceased,

RICHARD V. FINK, Trustee,
Plaintiff-Appellee,

v.

GRAVEN AUCTION COMPANY, INC., et al.,
Defendants-Appellants.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Missouri.

THIS CAUSE was submitted on the record of the district court, briefs of the parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court in this cause is AFFIRMED in accordance with the opinion of this Court.

A True Copy.
Attest:
s/ Michael E. Gans
Clerk

APPENDIX C — PETITIONER'S PETITION FOR REHEARING FILED WITH THE UNITED STATES COURT OF APPEALS SEPTEMBER 18, 1995

No. 942446WMS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RICHARD V. FINK, Trustee,

Plaintiff–Appellee,

v.

GRAVEN AUCTION COMPANY, INC., et al.,

Defendants–Appellants.

ON APPEAL from the United States District Court for the Western District of Missouri, Southern Division

Before: THE HONORABLE SCOTT O. WRIGHT.

Appendix C

SUMMARY

This Court erred in refusing to consider Appellants' issues 3 and 4 which raised an issue concerning the lower courts' and this Court's jurisdiction over the instant case. Had section 1208(b), (d) and (e)[1] been properly construed, this Court would find that the bankruptcy court did not have jurisdiction over this adversary proceeding and that this case should be dismissed. Appellants have reached this conclusion because there is no conflict between Section 1208(b) and (d); sections 1208(e) and 303 of title 11 prohibit involuntary conversion of a chapter 12 case to a chapter 7 case; the trustee was not a party in interest and therefore did not have standing to file the Motion to Convert; the courts erroneously treated "fraudulent conveyance" as the same as "fraud" used in §1208(d); any fraudulent conveyance found by the court, even if constituted also fraud, was not made in connection with the chapter 12 case.

The courts also clearly erred in finding the debtors' transfers were fraudulent conveyances because there was no clear and convincing proof of such. Finally, the court erred in affirming the award of punitive damages against Appellants because there was no evidential basis for awarding such damages.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 40A of the Eighth Circuit Rules of Appellate Procedure, Appellants petition the Court to rehear the case because, in Appellants' opinion, the Court has overlooked and misapprehended several significant points of law and fact.

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[1]Section 1208(b) and (d) were the subject of Appellees' issues 3 and 4.

Appendix C

I. THE COURT ERRED IN REFUSING TO CONSIDER APPELLANTS' ISSUES 3 & 4 BECAUSE THEY RAISE A STANDING AND JURISDICTIONAL ISSUE, AND A PROPER RESOLUTION OF ISSUES 3 & 4 WOULD REQUIRE A REVERSAL OF THE JUDGMENT AND DISMISSAL OF THE INSTANT CASE

A. Why Should This Court Consider Appellants' Issues 3 and 4?

In issues 3 and 4, Appellants contended that the district court erred (1) in affirming the judgment of the bankruptcy court which converted the case from chapter 12 to chapter 7; and (2) in affirming the bankruptcy court's denial of the debtors' motion to dismiss under 11 U.S.C. § 1208(b). In its opinion at page 4, this Court states that "[t]he defendants did not raise issues. . . 3, and 4 before the district court, and accordingly those issues are not properly before this court here on appeal." In footnote 4, this Court also hints that the doctrine of collateral estoppel might preclude Appellants from relitigating the same issues. Both of these state reasons for refusing to consider Appellants' issues 3 and 4 are inapplicable to this case.

In issues 3 and 4, Appellants raised, although imperfectly stated, the fundamental question of whether the federal courts (including the bankruptcy, district, and appellate courts) have jurisdiction in this case. More specifically, if the lower courts improperly converted the case from chapter 12 to chapter 7, and if the lower courts were required under 11 U.S.C. § 1208(b) to dismiss the case, the lower courts and this Court would not have jurisdiction over this case because the claims asserted by the trustee were purely state law claims (fraudulent conveyance claims) under § 428.020, RSMo 1991 and are not properly before the federal

courts. Because issues 3 and 4 raise a jurisdictional issue, such issue could be raised at any time in the proceeding, even first time on appeal. In *Glidden Company v. Zdanok* 370 U.S. 530, 535–536, 82 S.Ct. 1459, 1464–1465(1962), the Court stated that the rule prohibiting raising new issues on appeal does not apply when the alleged defect also operates as a limitation on a court's jurisdiction. In *Lucas v. Lucas*, 946 F.2d 1318, 1322(8th Cir. 1991), this Court also stated:

> "if a party lacks standing to bring a claim, a federal court may dismiss that claim . . . whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."

With respect to the doctrine of collateral estoppel, Appellants submit that the doctrine applies only to the same parties to the prior proceeding in which the issue was decided. Appellants were not parties in *Graven I*, and therefore, the decision on the propriety of the conversion in *Graven I* can not, without violating Appellants' constitutional right to due process, be made binding on Appellant.

Furthermore, this Court's decision in *Graven I* is not well supported in reason, misconstrued 11 U.S.C. §§ 1208(b) and 1208(d), and set a dangerous precedent which gave a bankruptcy trustee and bankruptcy court powers beyond the Congress' recognition and intent and in violation of 11 U.S.C. § 303. In the following, Appellants will demonstrate how this Court misconstrued the relevant statutes.

B. Section 1208(d) Does Not Authorize the Involuntary Conversion of A Chapter 12 Case to a Chapter 7 Case and Section 303 and 1208(e) of Title 11 Prohibit Such Conversion.

Appendix C

Turning to the propriety of converting the case from Chapter 12 to Chapter 7 and the refusal to dismiss the case under § 1208(b), Appellants contend that this Court misconstrued § 1208(b) and (d) in *Graven I* and overlooked § 303 and § 1208(e) and proper construction of these statutes would require a reversal of the judgment and dismissal of the case.

(a)The Imaginary Conflict Between § 1208(b) and § 1208(d)

Section 1208 (b) and (d) respectively:

> (b) On request of debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.
>
> (d) On request of a party in interest, and after notice and hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case. (Emphasis added).

The plain meaning of § 1208(b) is that a debtor under chapter 12 has an absolute right to have his case dismissed at any time. If a voluntary waiver of the right to dismiss is not enforceable against the debtor under § 1208(b), the debtor should not be forced to stay in a bankruptcy proceeding. The conflict that the courts have read into § 1208(b) and (d) was not necessary because can be construed to allow conversion only where the debtor did not seek dismissal of his chapter 12 case, but where a debtor seeks dismissal of his case, § 1208(b) mandates that the case be dismissed. Therefore, the conflict upon which *Graven I* and the opinions of the lower courts have all based was an imaginary conflict which did and does not exist at all, and proper application of § 1208(b)

and (d) in the instant case would have ended the bankruptcy proceeding by allowing debtors Bobby and Millie Graven to have their case dismissed. For this reason, the bankruptcy court was without jurisdiction to hear the instant case, and this case ought to be dismissed.

(b)§§ 303(a) and 1208 Prohibits Involuntary Conversion Against A Family Farmer

The reading of § 1208(b) and (d) as containing no conflict is also consistent with 11 U.S.C. § 303(a) which prohibits the commencement of an involuntary case against a family farmer. If an involuntary case can not be commenced under Chapter 7 against a family farmer, it is logical to conclude that the family farmer can not be forced to convert his chapter 12 case to Chapter 7. The proposition of the lower courts and this Court in *Graven I* that because a family farmer debtor had committed fraud, he should not be able to escape the conversion under § 1208(d), is without any statutory basis. Congress never gave the judiciary the power to punish a family farmer debtor for fraud by involuntarily converting a case from Chapter 12 to Chapter 7. *See e.g., Besler*, 19 B.R. 879(Bkrtcy. D.S.D. 1982)(holding that a farmer cannot be converted from a debtor under § 1101 et seq. of Title 11 to an involuntary debtor under § 701 et seq. of Title 11).

Appellants also would like to call the Court's attention to 11 U.S.C. § 1208(e) which provides:

> "Notwithstanding any other provision of this section[including § 1208(d)], a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."

Section 1208(e) makes it very clear that notwithstanding any finding of fraud under § 1208(d), a case may not be converted to

a case under another chapter of Title 11 if the debtor may not be a debtor under such chapter. Appellants maintain that because Section 303(a) prohibits the commencement of an involuntary case against a family farmer, a family farmer who seeks dismissal of his chapter 12 case and opposes converting his case to chapter 7 is an involuntary debtor under chapter 7 and, therefore, notwithstanding any finding of fraud under section 1208(d) the debtors' case can not be converted to chapter 7.[2]

Because the debtors' case was improperly converted to chapter 7 and debtors' motion to dismiss his case should have been granted, the trustee lacked the power to institute and maintain the instant case and the bankruptcy court lacked jurisdiction over the instant adversary proceeding. The judgment of the lower courts should, therefore, be reversed and the case be dismissed.

(d) "Fraud" under § 1208(d) Is Different From and Requires More Than "Fraudulent Conveyance"

Section 1208(d) allows conversion of a Chapter 12 case to a Chapter 7 case only if the court finds that "the debtor has committed fraud in connection with the case." This Court and the lower courts misconstrued "fraud" in the statute to mean "fraudulent conveyance" or "fraudulent transfer" which under § 428.020, RSMo 1991 and 11 U.S.C. § 548(a) is defined as, among many other things, transfer made with the "intent to hinder,

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[2]The bankruptcy court, in granting the motion of Appellee/trustee to convert, said that because conversion was granted, the debtors' motion to dismiss was moot. Such conclusion is against logic and reason. Because the debtors had filed their motion to dismiss prior to the trustee's motion to convert, the court should have made a decision on the debtors' motion to dismiss. Only after that motion is overruled on a substantial ground, could the court pass on Trustee's motion to convert because if the debtors' motion should have been granted, there would be nothing left to convert.

delay, or defraud" a creditor. Appellants maintain that "fraud" and "fraudulent conveyance" are totally different legal concepts. "Fraud" is defined in the Black's Law Dictionary as "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." "Fraudulent conveyance," on the other hand, is a general term given to certain transfers with or without intent to defraud. § 428.020, RSMo 1992, 11 U.S.C. §548. So it was said in *Citizen's Bank of Hayti v. McElvain,* 219 S.W. 75, 77(Mo. 1919):

> "The word "hinder," "delay" and "defraud" are connected by the word "or" in the statute, and it is sufficient if either result is accomplished by the conveyance.
>
> [The statutes] do not require that there be a fraudulent intent to "hinder, delay or defraud" in making the conveyance, it is the legal effect of the conveyance which the law looks to; it suffices, therefore, that the result of the conveyance is either of the three forbidden things. As pertinently observed by Richardson J. in *Reed v. Pelletier*, 28 Mo. 1, c.177:
>
> The term fraud, as understood in the statute concerning fraudulent conveyance, has the same meaning in the attachment law, and it is not necessary to show that the act originated in any premeditated design to commit a positive fraud or to injure other persons. There are many acts not the result of intentional fraud which the law, nevertheless, from their tendency to deceive other persons, or from their injurious consequences to

> the public, prohibits as being within the same reason and mischief as actual fraud."

As applied to the instant case, Appellants contend that a finding of "fraudulent conveyance," which was the ground both the lower courts and this Court relied on in *Graven I* to convert the case from Chapter 12 to Chapter 7, is not sufficient for purposes of § 1208(d).[3] The court in In re *Kingsley,* 162 B.R. 249 (Bkrtcy. W.D. Mo. 1974) clearly saw the difference between "fraud" as used in §1208(d) and "fraudulent conveyance" as used in § 428.020, RSMo. 1991, and 11 U.S.C. 548, when it stated that in order to find fraud justifying conversion of a case from chapter 12 to chapter 7, a court must find that five elements have been proven: (1) the debtor made misrepresentation; (2) at the time such representation was made, he knew that it was false; (3) he made the representation with the intention and purpose to deceive creditors; (4) creditors relied on such representation; (5) the creditors were damaged as a result of the misrepresentation.

If a finding of "fraudulent conveyance" were or could be treated as the same as a finding of "fraud" under § 1208(d), a trustee's power would be expanded beyond Congress' recognition and intent. The power of a bankruptcy trustee to avoid certain transfers as fraudulent conveyance presumes that there is a proper case under one of chapters of Title 11. A trustee could not rely on that power to create or convert a case under any of the chapters of Title 11.

---

[3]Note that the district court in *Graven I* stated that "[t]he conclusion of the bankruptcy court that the debtors had committed fraud in connection with the case is largely based upon its finding that the debtors conveyed their property with an intent to hinder, delay or defraud their creditors." See Appeal Record, page 000297.

Appendix C

The district court in *Graven I* also stated:

> "the bankruptcy court's determination of fraud in connection with the case is based in part upon the debtor's representation in their Schedules that there had been no transfers of property within one year prior to the filing of their bankruptcy petition. These representations are obviously untrue and the debtors failed to offer any convincing explanation for these representations."

District Court's slip Op. page 10; and Appeal Record 000300. The court apparently referred to the debtors' recording certain conveying instruments in February of 1987 which brought the transfers within the one year period prior to the bankruptcy petition. Appellants respectfully submit a finding of positive fraud (intentional misrepresentation) could not be based on such technical statutory definition as to when a transfer is considered to have occurred for purposes of the avoiding power of the trustee under 11 U.S.C. § 548.

Appellants also contend that the postpetition transfer of the mineral rights to the Oklahoma property, although wrongful, alone does not provide a sufficient basis for finding fraud for purposes of § 1208(d).[4]

Furthermore, a finding of fraudulent conveyance, even if it were sufficient for conversion purposes under § 1208(d), could not have been made without the transferees, Appellants in the instant case, being made parties to the proceeding in which such finding was made. This Court states in its opinion on page 5–6 that "in our view, this case involves the same facts and the same legal standard

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[4]Section 549 of Title 11 specifically provides for avoiding post–petition transactions.

involved in *Graven I* ,. . . the legal standards are identical," which is whether the conveyances were made with the "intent to hinder, delay or defraud creditors," and that *Graven I* is controlling authority in this case." In so saying, this Court made this adversary proceeding totally irrelevant and unnecessary – since in *Graven I*, fraudulent conveyance was already found, why was there a need for a suit against Appellants? The property interest of Appellants, which were legally separate entities from the debtors at the time of conversion, had been decided in *Graven I* to which they were not a parties! This Court states on page 6 of its opinion that "[t]he bankruptcy judge, who we affirmed in *Graven I*, reached the same conclusion in this case after reviewing the same facts and applying the same legal standards. . . and We affirm the findings and conclusions of the lower courts." The purpose of this adversary proceeding was to have the conveyances set aside as fraudulent conveyances under the relevant federal and state statutes. A declaration of the conveyances as fraudulent could not be made without the necessity and completion of the instant case. Strangely enough, the lower courts and this Court had all made that declaration in *Graven I*.[5] In short, it is appellants' position that because the courts in *Graven I* could not have made a complete and final finding that the transfers made by the debtors were fraudulent conveyances, the courts' treating "fraudulent conveyance" as the same as "fraud" under § 1208(d) and the conversion based

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[5]The district court in affirming the judgment of the bankruptcy court in this adversary proceeding quoted extensively this Court's opinion in *Graven I*. See Judge Wright's opinion on page 11. This demonstrates clearly that the lower courts had, in violation of Appellees' rights of due process, made up their minds well before this adversary proceeding was instituted. It also demonstrates the error of the courts in treating "fraudulent conveyance" as the same as "fraud" for § 1208 purposes.

thereupon was erroneous.

This Court would set a dangerous precedent by allowing a bankruptcy court to convert a case involuntarily against a family farmer under Chapter 12 upon a mere showing of fraudulent conveyance.

(e) If The Debtors Had Committed Any Fraud, It was Not Committed In Connection With The Case

Appellants would also like to call this Court's attention to the language in § 1208(d) "the debtor has committed fraud in connection with the case." The word "case" clearly means a case under Chapter 12. Many of the transfers, upon which this Court and lower courts relied to find "fraud in connection with the case" had been made by Bobby N. Graven over about one to two years before the filing of the petition under chapter 12, and over one year before the effective date of Chapter 12, November 27, 1986. For instance, Bobby N. Graven's transfers of real estate to Graven Auction occurred in January of 1985 and Millie Graven's transfer of her interest therein by quit claim deeds occurred a year thereafter. *See* this Court's opinion in *Graven I.* The same thing can be said of the transfer of the stock in both Appellants' corporations to the irrevocable family trust which also occurred in January of 1986. The same is true with respect to the transfers of in January and mid November of 1986, which this Court specifically mentioned in *Graven I.* Although some of the deeds executed in the real estate transfers were not recorded until February of 1987, that evidence is relevant only because of technical statutory definition of when transfer is considered to have occurred and does [not] show that the original transfers were fraudulent any more than the transfers were innocent. It could hardly be said, therefore, that these transfers constituted "fraud in connection with the case [under Chapter 12]." Any fraud committed not in connection with a case

under chapter 12, should be actionable only in the state court but not in the bankruptcy court.

The above analysis is consistent with the statement by Senator Grassley which this Court quoted in *Graven I,* 936 F.2d at XXX: "If fraud is found, the case will be dismissed or converted to chapter 7. This encourages good faith, [sic] honest dealing by the debtor throughout the case."

In short, this Court misconstrued § 1208(d) by treating "fraudulent conveyance" as the equivalent of "fraud in connection with the case." For this reason, the conversion of the debtors' case to a chapter 7 case was improper and this Court should overrule its decision *Graven I* and dismiss the case.

(f) The Decision To Convert Was Contrary To The Purpose of The Bankruptcy Code As Stated In *Graven I*

In affirming the lower courts' decision to convert, this Court in *Graven I* stated:

> "The purpose of the bankruptcy code is to provide a "fresh start" for insolvent debtors. (Citation omitted). The opportunity for a "completely unencumbered new beginning," however, is not available to all, but is limited to the "honest, but unfortunate debtor." (Citation omitted).
>
> The Supreme Court's statements make clear that the purpose of the bankruptcy coded is to protect the honest debtor, not to provide a shield for those who exploit the code's protection then seek to escape judicial authority when their fraudulent schemes are exposed.

In seeking the dismissal of their chapter 12 case, the debtors in *Graven I* did not seek a "fresh" or "completely unencumbered new beginning" because no part of the debtors' debts

were discharged, nor did and could they "escape judicial authority" because the creditors could still sue and collect from the debtors in the appropriate state courts. In converting the case at the request of the trustee alone[6] and over the objection of the debtors, the lower courts and this Court in *Graven I* went well beyond merely denying the debtors by forcing liquidation of their assets. Moreover, the decision to convert created the opportunity for the instant adversary proceeding which resulted in further encumbrance on already struggling family farmer.[7] Haven't the courts gone too far!

II. THIS COURT ERRED BY AFFIRMING, AS NOT CLEARLY ERRONEOUS, THE FINDING OF BANKRUPTCY COURT AND THAT OF THE DISTRICT COURT WITH RESPECT TO FRAUDULENT CONVEYANCE BOTH IN *GRAVEN I* AND IN THIS CASE

Appellants have attempted to demonstrate in the above that the courts in *Graven I* erroneously refused to grant the debtors' motion to dismiss as required under § 1208(b) and erroneously converted the case to a chapter 7 case and consequently, the courts do not have jurisdiction or power over the instant case. In this section of the petition for rehearing, Appellant will demonstrate that the courts also clearly erred in making the finding that the debtors'

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[6]As indicated earlier in connection with the discussion of real party in interest, the trustee's only interest might be merely to prolong the bankruptcy proceeding so that he could earn more trustee's fees. Appellees' counsel is not attempting to impinge or speculate on the motive of the trustee/appellee, but merely points out that the trustee could be over-zealous in such proceedings to the detriment of debtors and creditors alike.

[7]The judgment of the lower courts in this adversary proceeding held that Appellees' corporations were alter egos of debtor Bobby N. Graven. If the judgment is let to stand, the debtor would bear more debts than what they had owed at the time of filing the chapter 12 petition.

transfers were fraudulent conveyances.

Many of the transfers were made at a time when the debtors were current in the debt payments except with the Federal Land bank of St. Louis. The delinquency with the bank occurred in April of 1986. Appeal Record, at page 000771. Although the transferred property would have been available to pay their debts, there were also innocent and lawful reasons for the transfer. For instance, the debtors transferred the corporate stock because debtor Bobby N. Graven was in ill health and he wanted to avoid probate and provide for his family.[8] In addition, the debtors intended to pay all their debts and reasonably expected that they would be able to keep up with the payments. They merely requested for more time within which to pay their debts. Only when the Federal Land Bank refused to grant the debtors more time did the debtors file their petition under Chapter 12. In so filing, the debtors did not seek discharge but merely wanted to present a plan for the payment of their debts.[9] Thus, there was no showing of actual intent to "delay, hinder or defraud" the creditors. Such intent is required under both § 548 and § 428.020, RSMo 1991. All that the evidence showed was a lot of transfers and in some instances there was not adequate consideration for the transfers. The Transfers, even made at a time when a debtor owes substantially to others, could still be innocent,

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[8]Although the consequence of such transfer would put the assets beyond the reach of the creditors, the creditors were protected by the state law on fraudulent conveyance. Such state laws are designed to protect creditors but not to label and punish debtors for positive fraud.

[9]Section 1228 conditions the discharge of a family farmer on debtor's completion of all payments under a confirmed plan unless the debtor could show that the in completion of the payments under the plan was due to circumstances for which the debtor should not justly be held accountable.

if the debtor at the time of the transfer made his debt payments on time and the debtors honestly believed that they could make timely payments on their debts in the future without the transferred property. Appellants must submit that based on the entire record, the appellee/trustee failed to meet the evidential standard of proving "intent to hinder, delay or defraud" by clear and convincing evidence. *See South Side National Bank in St. Louis v. Winfield Financial Services Corp.,* 783 S.W.2d 140 (Mo. App. 1989)(setting the clear and convincing evidential standard).

Special mention should be made about the "two–court rule" relied on in this Court's opinion at page 5. Appellants maintain that rule has no place in the instant case because this Court and the lower courts had made their decisions well before the instant case in *Graven I* to which Appellants were not even parties.

For the above reasons, the courts clearly erred in finding that the transfers were fraudulent conveyances.

III. THIS COURT ERRED IN AFFIRMING THE LOWER COURTS' JUDGMENT AWARDING TRUSTEE/APPELLEE PUNITIVE DAMAGES

In affirming the judgment of the bankruptcy court and that of the district court, this Court also affirmed the judgment for punitive damages. In awarding the trustee punitive damages, Judge Koger relied on the Missouri case of *Lewis v. Barnett,* 694 S.W.2d 743(Mo. App. E.D. 1985). That case is clearly distinguishable in that the debtors there not only made fraudulent conveyances, but also forged signatures of another person on two documents. It is very clear that the court in the cited case awarded the punitive damages only because of the egregious conduct of forging another's signatures. Courts have rarely awarded punitive damages in cases brought to avoid transfers as fraudulent conveyances in the absence of fraud in its ordinary sense. Neither the federal statutes nor the

Missouri statutes expressly authorize punitive damages. In the instant case, because there was no proof of fraud in its ordinary sense, neither was there any proof of egregious conduct as had happened in *Lewis v. Barnett, supra*, the award of punitive damages was in error and should be reversed.

Appellants recognize that they did not raise this as an issue in its appellate brief, but the award of punitive damages was not only an error and injustice to Appellants but affirming it would also set a dangerous precedent of allowing punitive damages upon a mere showing of fraudulent transfers. Appellants respectfully ask that the award of punitive damages be reversed.

WHEREFORE, Appellants respectfully pray that this Court grant Appellants' Petition for Rehearing so that the important issues raised herein may be fully briefed for and argued before the Court.

Respectfully submitted,

By: Will Fletcher
Mo. Bar No. 23536

Jianbin (James) Wei
Mo. Bar No. 45593

Attorneys for Appellants
Graven Realty, Inc.
Graven Auction Co., Inc.
Bobby F. Graven, Trustee
under the Bobby N. Graven Trust

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 10, 1995

No. 94-2446WMS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RICHARD V. FINK, Trustee,

Plaintiff-Appellant,

v.

GRAVEN AUCTION COMPANY, INC., et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the
Western District of Missouri,
Southern Division

The petition for rehearing filed by the Appellants has been considered by the court and is denied.

Order Entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E — PETITIONERS' MOTION TO STAY MANDATE FILED WITH THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT NOVEMBER 20, 1995

No. 94-2446WMS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Estate of Bobby Noah
Graven, In re: Estate of Millie
Ann Graven, Deceased,

RICHARD V. FINK, Trustee,

Plaintiff-Appellant,

v.

GRAVEN AUCTION COMPANY, INC., et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the
Western District of Missouri,
Southern Division

Appendix E

MOTION TO RECALL OR STAY MANDATE PENDING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

COME NOW, Defendants–Appellants, for their Motion To Recall Or Stay Mandate Pending Petition For Writ of Certiorari To the United States Supreme Court, state to the Court as follows:

1. That on September 5, 1995, this Court rendered its opinion in the above–referenced case, denying the points raised by Appellants in their appeals;

2. That thereafter on September 18, 1995, Appellants filed their Petition For Rehearing in said case;

3. That on October 10, 1995, this Court denied Appellants' Petition For Rehearing;

4. That on October 25, 1995, this Court issued its Mandate to the U.S. District Court for the Western District of Missouri;

5. That Appellants intend to file and now are in the active process of preparing a Petition For Writ of Certiorari To the United State Supreme Court;

6. That Appellants believe that they have raised in their appellate brief and their Petition for Rehearing substantial questions of law and they do intend to raise such issues in their Petition To the United States Supreme Court;

7. That one of the substantial issues concern the bankruptcy court's power to convert a chapter 12 case against the will of a chapter 12 debtor, a family farmer, to a chapter 7 case;

8. That Appellants' position has been that the courts, including this Court, violated section 303(a) of Title 11 of the United States Code, a general provision of the bankruptcy Code applying to chapter 12, which provides that an involuntary case can not be commenced against a family farmer, and the bankruptcy

proceedings against the debtors and the adversary proceeding against Appellants have been and are being maintained without proper jurisdiction;

9. That another substantial issue is that the court's determination of fraudulent transfer has so far departed from the accepted and usual course of judicial proceeding in that the decision in In re *Graven*, 936 F.2d 378(8th Cir. 1991), precluded a fair determination in Appellants' case, and that such departure calls for the United States Supreme Court to exercise its supervisory power over the lower courts;

10. That these issues are substantial in that they are important questions of federal law and that no other courts have ever considered them;

11. That this Court has improperly ignored the interaction between section 1208(d) and section 303(a) and 1208(e) of Title 11 of the U.S.C.;

12. That after the issuance of Mandate by this Court, the Plaintiff–Appellee, the bankruptcy trustee, is now proceeding to liquidate Appellants' assets;

13. That unless this Court's mandate is recalled or stayed pending Appellant's Petition For Writ of Certiorari To the United States Court, the trustee would continue to liquidate Appellants' assets;

14. That liquidation of Appellants' assets, so drastic in nature and so severe in consequences, would do irreparable harm to Appellants in that if the United States Supreme Court decides to grant Appellants the Writ for Certiorari and eventually holds in favor of Appellants, it would be impossible to restore Appellants, after full liquidation, to their current status;

15. In support of their Motion To Recall Or Stay Mandate Pending Petition For Writ of Certiorari In the United States

Appendix E

Supreme Court, Appellants also file and attach to this Motion certain suggestions to aid this Court's consideration.

WHEREFORE, Appellants respectfully move this Court to recall or stay its mandate pending Appellant's Petition For Writ of Certiorari To the United States Supreme Court.

Respectfully submitted,

s/Will Fletcher by James Wei

s/ James Wei

By:	Will Fletcher	Jianbin (James) Wei
	Mo. Bar No. 23536	Mo. Bar No. 45593

Attorneys For Defendants–Appellants
Grave Auction Co., Inc.
Graven Realty, Inc.
Bobby F. Graven, Trustee under
the Bobby N. Graven Trust

APPENDIX F — SUGGESTIONS IN SUPPORT OF PETITION'S MOTION TO STAY MANDATE FILED WITH THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT NOVEMBER 20, 1995

No. 94-2446WMS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Estate of Bobby Noah Graven, In re: Estate of Millie Ann Graven, Deceased,

RICHARD V. FINK, Trustee,

Plaintiff-Appellant,

v.

GRAVEN AUCTION COMPANY, INC., et al.,

Defendants-Appellants.

ON APPEAL from the United States District Court for the Western District of Missouri, Southern Division

Appendix F

SUGGESTIONS IN SUPPORT OF MOTION TO RECALL OR STAY MANDATE PENDING PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

Appellants maintain, as they did in their Petition For Rehearing, that this Court erred in affirming the District court's judgment because it erroneously construed and neglected several statutes in the Bankruptcy Code. For purpose of their Motion To Recall and Stay Mandate, Appellants again point out and explain where and why the Court committed error and why such errors are substantial and would likely cause a writ of certiorari to issue by the United States Supreme Court.

A. **Rule 10(c) of the Supreme Court Rules States That the Court Is Likely To Exercise Its Discretion To Grant A Writ of Certiorari If A United States Court of Appeals Has Decided An Important Question of Federal Law That Has Not Been, But Should Be Settled By The United States Supreme Court. Section 1208(d) Does Not Authorize the Involuntary Conversion of A Chapter 12 Case against the Debtors, a Family Farmer, and Sections 303(a) and 1208(e) prohibits Such Conversion, and Therefore, the Bankruptcy Court Did Not Have Jurisdiction Over Appellants And the Adverse Proceeding Against Defendants–Appellants Has Been Improperly Instituted and Maintained. This Is Such An Important Federal Issue in That This Court's Decision Took Away The Protection Congress Has Given to Farmers. No Other U.S. Court of Appeals Has decided This Important Federal Issue and Supreme Court Ought To and Is Likely To Grant Discretionary Review**

Appendix F

(a) The Imaginary Conflict Between Sections 1208(d) and 1208(b)

Sections 1208(b) and 1208(d) provides respectively:

> (b) On request of debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.
>
> (d) On request of a party in interest, and after notice and hearing, the court, may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

The plain meaning of Section 1208(b) is that a debtor under chapter 12 has an absolute right to have dismissed at any time prior to any conversion. Citation of cases. The two statutory provisions could be read in harmony because section 1208(d) can be construed to allow conversion only where the debtor does not object to conversion and does not seek dismissal of his case, but where the debtor seeks of his chapter 12 case prior to any conversion, section 1208(b) mandates that the case be dismissed.

(b) Sections 303(a) and 1208(c) Both Prohibit Involuntary Conversion of A Chapter 12 Case To A Chapter 7 Case Against A Family Farmer

The reading of sections 1208(b) and 1208(d) as containing no conflict is also consistent with section 303(a) which prohibits the commencement of an involuntary case against a family farmer. Section 303(a) provides:

> An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against

> a person, except a farmer, family farmer, or a corporation that is not moneyed, business, or commercial corporation that may be a debtor under the chapter under which such a case is commenced.

Section 303(a) is a general provision which applies to all the chapters including chapter 12 and can not be ignored in construing section 1208(d). It should also be noted that section 303(a) was amended by adding the reference to "family farmer" in October of 1986, the same time when chapter 12 was enacted, to make sure that family farmer would not be subject to an involuntary chapter 7 case.

Appellants have maintained that the involuntary conversion of a chapter 12 case to chapter 7 against the debtors is the same as the commencement of involuntary chapter 7 case against a family farmer, and therefore is prohibited by section 303(a). Construing section 1112(c), a provision similar to section 1208(b) or 1208(d), the courts have held unless it is requested by the farmer debtor, a court can not convert a case under chapter 11 to a case under chapter 7. In re *Holthoff*, 58 B.R. 216, 221(Bkrtcy E.D. Ark. 1985); In re *Cattle Complex Corp.*, 54 B.R. 50(Bkrtcy D.N.M. 1985); and In re *Besler*, 19 B.R. 879, 884(Bkrtcy. D.S.D. 1982). Had the debtors' motion to dismiss his chapter 12 in *Graven I* been granted by the courts, the creditors would not be able to commence an involuntary chapter 7 case against the debtors, who were family farmers, by reason of the prohibition of section 303(a). The creditor should not have been allowed to do under section 1208(d) what they would not be able to under section 303(a). Section 303(a) does not make a fraud exception to its prohibition against involuntary case against family farmers.

Section 303(a)'s prohibition against the commencement of

involuntary case against a family farmer is carried into chapter 12 by way of section 1208(e) which provides:

> "Notwithstanding any other provision of this section [including section 1208(d)], a case can not be converted to a case under another chapter unless the debtor may be a debtor under such chapter."

Section 1208(e) makes it crystal clear that not withstanding any finding of fraud under section 1208(d), a court can not convert a chapter 12 case to a case under another chapter if the debtor may not be a debtor under such chapter. By reason of section 303(a), a family farmer can not be made a debtor if he opposes the commencement of a chapter 7 case against him, and therefore conversion of the debtors' case is also prohibited by section 1208(e).

No other courts have ever passed upon the interactions between sections 1208(d), 1208(e) and 303(a). In *Graven I,* this Court considered the interaction between section 1208(b) and (d) but failed to consider the interactions between, and the clear meaning of sections 303(a) 1208(d) and (e). For that reason, the United States Supreme Court is most likely to grant Appellant a writ of certiorari to give its authoritative interpretation of the statutory sections.

B. Rule 10(a) of the Supreme Court Rules Provides That the Court Is Likely To Grant A Writ of Certiorari In A Case Where A United States Court of Appeals Has So Far Departed From The Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such A Departure By A Lower Court, As to Call For An Exercise of This Court's Supervisory Power. This Court and Lower Courts Has Departed From the Accepted and Usual Course of Judicial Proceedings When Said

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Courts Already made the Determination That There Had Been Fraudulent Conveyances By The Debtors In *Graven I* Where Appellants Were Not Even Parties and Based on That Determination This Court Converted the Debtor's Case From Chapter 12 to Chapter 7. Essentially This Court and Lower Courts Had Made Their Decision On the Very Issue of Whether the Transfers to Appellants By the Debtors Were Fraudulent Long Before This Adverse Proceeding Was Instituted. In So Doing, This Court and Lower Courts Have So Far Departed From the Accepted and Usual Course of Judicial Proceedings As To Call For An Exercise of the Supreme Court's Supervisory Power. This Court's and Lower Courts' Entrapment in *Graven I* Was Caused By The Erroneous Treatment of Fraudulent Transfer Under Section 1208(d) As the Same As Fraud.

In their Petition for Rehearing, Appellants pointed out the difference between fraud and fraudulent transfer and that fraud under section 1208(d) require proof of much more than mere fraudulent transfer. Appellants also pointed out that this Court's and lower courts' treatment of fraudulent transfer as the same as fraud in *Graven I* was so irregular that it defies logic. As Appellants stated at page 9–10 of their Petition for Rehearing:

> [A] finding of fraudulent conveyance, even if it were sufficient for conversion purpose under section 1208(d), could not have been made without the transferees, Appellants in the instant case, being made parties to the proceeding in which such finding was made. This Court states in its opinion on pages 5–6 that "in our view, this

case involve the standard are identical,"[1] which is whether the conveyances were made with the intent "to hinder, delay, or defraud creditors," and that "*Graven I* is controlling authority in this case." In so saying, this Court made this adversary proceeding totally irrelevant and unnecessary — since in *Graven I*, fraudulent conveyance was already found, why there was a need for a suit against Appellants? The property interest of Appellants, which were legally separate entities from the debtors at the time conversion, had been decided in *Graven I* to which they were not even parties. This Court states on page 6 of its opinion that "[t]he bankruptcy judge, who we affirmed in *Graven I*, reached the same conclusion after reviewing the same facts and applying the same legal Standards and we affirm the findings and conclusions of the lower courts." The purpose of this adversary proceeding was to have the conveyances set aside as fraudulent conveyances under relevant federal and state statutes. A declaration of the conveyances as fraudulent could not be made without the necessity and completion of the instant case. Strangely enough, the lower courts and this Court had all made that declaration in *Graven I*.

This Court and lower courts had entrapped in the determination that was made in *Graven I*, and it was impossible at

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[1]That legal standard was "fraudulent conveyance." This was made very clear by what this Court said in *Graven I*, 936 F.2d at 383:

> The bankruptcy court applied the relevant statutory standard when it found a clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors. [citation omitted.] The hinder, delay, and defraud standard is found in both 11 U.S.C. section 548(a)(1988) and Mo. Rev. Stat. section 428.020(1978).

all for said courts to make any determination in Appellants' case that would be contrary to *Graven I*. This is highly irregular and calls for the United States Supreme Court to exercise its supervisory power over the lower courts. The irregularity in turn shows the erroneous nature of the lower courts' and this Courts' treatment of fraudulent conveyance as the same as fraud under section 1208(d).

As Appellants pointed out in their Petition for Rehearing, the power of a bankruptcy trustee to avoid fraudulent conveyances under section 548 is premised on the existence of a case, that power can not be relied on to create a case that is not otherwise there. This Court's decision in *Graven I* sets a dangerous precedent that gives the power to a bankruptcy court to convert a case under section 1208(d) upon mere finding of fraudulent conveyance and that calls for the review of the United States Supreme Court.

c. **There is Good Cause For Granting Recall or Stay of Mandate to Appellants Because the Chapter 7 Liquidation, Once Occurred, Would Be Irreversible and There Would Be Irreparable Harm to Appellants.**

For the reasons set forth in the above and in Appellants' Petition For Rehearing, Appellants maintain that this Court had committed a clear error on a purely legal question that should be reviewed by the United States Supreme Court. Had the statutes been correctly construed, this Court would have come to the conclusion that the initial conversion of chapter 12 case to chapter 7 case was in violation of section 303(a). That being so, the current proceedings against the appellants and the debtors in the bankruptcy court are without proper jurisdiction. The lack of jurisdiction by the bankruptcy court and the maintaining of the bankruptcy proceedings in violations of section 303(a) and 1208(e) is most likely to cause a writ of certiorari to issue in the United

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States Supreme Court.

Liquidation of Appellants' assets is so drastic that it should not be allowed before the important issues Appellants have raised in their Petition For Rehearing and will be raising in their Petition For Writ of Certiorari in the United States Supreme Court are resolved. If the trustee is allowed to proceed with the liquidation, irreparable harm would be done to Appellants.

For the foregoing reasons, Appellants state that this Court should grant Appellant's Motion To Recall or Stay Mandate pending Petition For Certiorari in the United States Supreme Court.

By Will Fletcher
Mo. Bar No. 2356

Jianbin (James) Wei
Mo. Bar No. 45593

Attorneys For Defendants–Appellants
Graven Auction Co., Inc.
Graven Realty, Inc.
Bobby F. Graven, Trustee under
the Bobby N. Graven Trust

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING MOTION TO STAY MANDATE FILED DECEMBER 20, 1995

No. 94-2446WMS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Bobby Noah Graven, etc.,

RICHARD V. FINK, Trustee,

Plaintiff-Appellant,

v.

GRAVEN AUCTION COMPANY, INC., et al.,

Defendants-Appellants.

ON APPEAL from the United States District Court for the
Western District of Missouri,
Southern Division

Appellants' motion to recall the mandate or for stay of mandate pending the filing of a petition for certiorari with the Supreme Court has been considered by the court and is denied.

Order Entered at the Direction of the Court:
s/Michael E. Gans - Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION FILED MAY 9, 1994

No. 94-2446WMS

GRAVEN AUCTION COMPANY, INC., et al.,

Appellants,

v.

RICHARD V. FINK, Trustee,

Defendants-Appellants.

Before this Court is the appeal filed by the corporation and the Trust created by Bobby N. Graven. Bobby N. Graven was the debtor in the underlying bankruptcy case. Appellants ask this Court to reverse the Bankruptcy Court's[1] decision that Bobby N. Graven and his wife Mildred Graven fraudulently conveyed their property with the intent to shield their assets from their creditors. Appellants have filed their brief, the Trustee has filed his brief, and appellants have filed their reply to the Trustee's brief. For the reasons set forth below, Judge Koger's decision will be affirmed.

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[1]The Honorable Frank Koger, United States Bankruptcy Court for the Western District of Missouri.

Appendix H

BACKGROUND

Bobby N. Graven and his late wife, Millie, (debtors) filed a voluntary petition for bankruptcy pursuant to Chapter 12 in November 1987. They submitted a plan for reorganization, and several of their creditors objected and asked that the Bankruptcy Court direct the Trustee to conduct an investigation pursuant to § 1106(a). Judge Koger did so direct the Trustee. The Trustee conducted an investigation and submitted his report to the Bankruptcy Court. The Trustee's report revealed that the debtors had, prior to filing for bankruptcy, transferred most of their assets to corporations owned and controlled by them, and transferred the corporate stock received in exchange to a "family trust" that was also controlled by them. The Bankruptcy Court then scheduled a hearing so that the parties could be heard. At the hearing, before it proceeded, the debtors filed a motion for voluntary dismissal of their petition. The Trustee objected to the dismissal, and asked that the court consider converting the case to a Chapter 7 bankruptcy instead of dismissing it. Judge Koger agreed to consider that option, and he later conducted another hearing at which both sides presented their arguments on the issue. After careful consideration, in May, 1989 Judge Koger issued a Memorandum Opinion in which he found that: 1) the debtors had committed fraud in an attempt to put assets out of the reach of creditors; and 2) that because of such fraud the debtors would not be allowed to dismiss their petition but that he would instead grant the Trustee's motion to convert the proceedings to a Chapter 7 bankruptcy.

Debtors appealed, and in March, 1990, The Honorable William R. Collinson, Senior U.S. District Court Judge for the Western District of Missouri, issued a decision affirming the Bankruptcy Court's decision. Debtors appealed Judge Collinson's decision, and in June, 1991, The United States Court of Appeals

for the Eighth Circuit issued an opinion affirming Judge Collinson's decision.

The Trustee then filed an adversary proceeding against the debtors seeking to set aside transfers of property made by the debtors to certain corporations and seeking to set aside transfers of corporate stock. The Trustee based his action on his claim that the transfers in question were made in an attempt to conceal assets and protect such assets from debtors' creditors. Judge Koger tried the issues in July, 1992, and then in October, 1992, issued an opinion which contained the following findings: 1) that debtor Bobby N. Graven had failed to comply with orders of court; 2) that sanctions should be imposed upon Bobby N. Graven for failure to comply with court orders; 3) that all pleadings filed by Bobby N. Graven would be stricken; and 4) that judgment should be entered in favor of the Trustee on Counts I, II, III, VI, VIII and IX of the Trustee's second amended complaint. Judge Koger ordered debtors to turn over certain pieces of property to the Trustee and indicated that the issue of whether the defendant was liable for damages, and if so in what amount, would be taken up at a later date. He then held a hearing on the issue of damages, and in February, 1993 issued yet another opinion awarding the Trustee actual damages of $122,086.45 and punitive damages in the amount of $50,000. Debtors have now filed this appeal, and in their brief list the following "Issues Presented":

1. The bankruptcy court's ruling that Bobby N. Graven is and was the alter ego of defendant's [sic[2]] Graven Auction and Graven Realty was clearly erroneous.

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[2]Appellants first filed a brief which contained no citations to the record. They then filed an amended brief. The brief is poorly written, unorganized and contains numerous misspellings and grammatical errors.

2. The bankruptcy court erred in allowing the trustee to bring an alter ego action against defendant. In doing so the bankruptcy court committed clear error.

3. The bankruptcy court's ruling that defendant Bobby N. Gravens [sic] transfers of assets to Graven Auction were fraudulent is clearly erroneous.

4. The bankruptcy court's ruling that the transfers of stock from Graven Realty and Graven Auction to the Bobby N. Graven Irrevocable Trust were fraudulent is clearly erroneous.

ANALYSIS

Issue Number 2

The Court will first address issue number two. Issue number two states:

> The bankruptcy court erred in allowing the trustee to bring an alter ego action against defendant. In doing so the bankruptcy court committed clear error.

In support of this contention, appellant cites In re *Ozark Restaurant Equipment Co.*, 816 F.2d 1222 (8th Cir. 1987).

The Trustee argues that the issue of whether he should have been allowed to bring an alter ego action is not properly before this Court, because the debtors did not raise the issue before the Bankruptcy Court nor did they list the issue in their Statement of Issues filed pursuant to Bankruptcy Rule 8006.

In reply, debtors admit that this issue was not raised before the Bankruptcy Court or listed in their Statement of Issues. However, they claim that, ". . . the error is so significant that the Court can and should take up this issue Sua sponte." [sic]. Furthermore, they argue that ". . . it would be a terrible injustice to allow the Trustee to pursue an alter ego action against defendants in this case when the Bankruptcy Code has not authorized the

Trustee to assert claims such as the instant alter ego action." Appellants' Reply Brief, P.2.

This Court finds the Trustee's arguments more persuasive.

First of all, although the Trustee has indicated that this is an issue of "standing," it is actually a "real party in interest question." *Lucas v. Lucas*, 946 F.2d 1318, 1322 (8th Cir. 1991). In *Lucas*, the Eighth Circuit noted that:

> 'Standing' is a constitutional doctrine regarding one's right to challenge a governmental action. . . [and] if a party lacks standing to bring a claim, a federal court may dismiss the claim. . . whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter. . . "

Lucas, 946 F.2d at 1322, n.6.

The court went on to note that the case before it did not involve an actual question of standing, but "rather one of identifying whether [the person who brought the action was] the real party in interest.." Similarly, the question raised before this Court is not actually whether the Trustee had "standing" to bring the alter ego claim, but whether the Trustee was the real party in interest.

The general rule is that an issue not raised before the Bankruptcy Court and not listed on a Statement of Issues will not be considered on appeal. *Hofer v. Merchants State Bank*, 823 F.2d 271, 272 (8th Cir. 1987); In re *Pine Mountain, Ltd.*, 80 B.R. 171, 173 (9th Cir. B.A.P. 1987); Appellant admits that the issue of whether the Trustee was the real party in interest was not listed in their Statement of Issues. However, they cite to In re *Cohoes Industrial Terminal, Inc.*, 90 B.R. 67 (S.D.N.Y. 1988) for the proposition that in certain cases the failure to list an issue on a

Statement of Issues will not preclude consideration of that issue by an appeal court. In that case, however, the debtor had raised the issue in question before the Bankruptcy Court, and had merely failed to list it in his Designation of Issues filed pursuant to Bankruptcy Rule 8006. The district court stated:

> Although [the debtor] did not raise this point in his Designation of Issue on Appeal under B.R. 8006, we will consider the argument since B.R. 8006 "is not intended to bind either party to the appeal as to the issues that are to be presented."

In re *Cohoes*, 90 B.R. at 70 (citing **Norton's Bankruptcy Rules, Rule 8006, Editor's Comments, Page 750).**

That case is distinguishable from the one before this Court, because, here, the debtor did not challenge, in the lower court, that the Trustee was the real party in interest. Thus, this is not just a technical omission, but a case where a party is attempting to raise, on appeal, an issue that was not preserved in the lower court proceedings.

This Court finds that because the debtors did not raise the issue of the Trustee's right to bring an alter ego action before the Bankruptcy Court, and did not list that issue as one to be argued in their Statement of Issues, they have waived their right to have that issue considered.

Furthermore, even if that issue were properly before this Court, the debtors' contention has no merit. They claim that the Trustee should not have been allowed to bring an alter ego action, and cite In re *Ozark Restaurant Equipment Co.*, 816 F.2d 1222 (8th Cir. 1987) as support for that contention. However, In re *Ozark* is not on point. In that case, the debtor was a corporation, and the trustee sought to pierce the corporate veil and hold the individual officers of the corporation personally liable for the

corporation's debts. The Eighth Circuit found that the right to bring such an action belonged to the stockholders of the corporation, not to the corporation itself, and thus found that the trustee could not assert the action, as the trustee was only authorized to assert claims of the debtor. Here, the debtors are not corporations, but individuals who allegedly set up two corporations and then transferred their property into the corporations, and then set up a trust and transferred the corporate stock into the trust, all in an attempt to protect the property from their creditors. The Trustee contended that property which should have, but for the debtor's fraudulent conveyances, been part of the bankruptcy estate, was held in the possession of the corporations and the trust. This is a different fact situation than that presented in In re *Ozark* and the law of that case is not applicable.

Issue 1

The remaining issues are all attacks on Judge Koger's finding that the debtors' conveyances were fraudulent and were done with the intent to put property out of the reach of creditors.

Issue number one pertains to Judge Koger's finding that Bobby N. Graven was the alter ego of Graven Auction and of Graven Realty. In support of their argument that Mr. Graven was not their alter ego, appellants note that "there were three separate and distinct entities." They then note that the corporations were "formed in accordance with the laws of the State of Missouri." They further note that there were some differences between the two corporations. They finally conclude that "neither Graven Realty nor Graven Auction, nor the Bobby N. Graven Irrevocable Trust were set up as a fraud on anyone. . . Nothing in this case should have led to the decision that Bobby N. Graven was the alter ego of these corporations. Further corporate formalities was not ignored, everything was done properly and in order." [sic.]

Appendix H

Appellants have failed to convince this Court that Judge Koger made a mistake. In their first brief, appellants made virtually no citations to the record. They then filed an amended brief, which contained citations to the record. In the argument on Issue number one, however, appellants have only shown, by reference to the record, that technically they were separate entities. No one has disputed that the Gravens went through the formal requirements for setting up the corporations and the Trust. However, Judge Koger found ample evidence to indicate that Bobby N. and Millie Graven intentionally transferred property to these entities with the intent to put the property out of the reach of their creditors. He further found that the entities were controlled completely by Bobby N. Graven. Appellants apparently concede that such findings justify Judge Koger's ruling that he was the alter ego of the corporations, but contend that the evidence presented did not support the findings. Unfortunately for them, appellants have the burden of showing that a mistake has been made, not have to justify the Bankruptcy Court's decision unless appellants first point out specific parts of the record to support their contention that the Bankruptcy Court's decision was erroneous. They have failed to do that.

Appellants do indicate that the court made a mistake in stating that Graven Realty was formed in 1985, as it was actually formed in 1975. Appellant does not indicate where, in the record, Judge Koger made this mistake, and this Court has been unable to find such a mistake. However, assuming that he did make a mistake as to this one fact, that alone is not enough to convince this Court that the Bankruptcy Court erred in finding that Bobby N. Graven was the alter ego of that corporation. Furthermore, appellant apparently never brought that fact to Judge Koger's attention, so his attempt to present evidence on that fact now is

improper.

Issue 3

As to Issue Number three, which involves the transfers of property to Graven Auction, the analysis is not much different. In arguing that Judge Koger's findings of fraud were erroneous, appellants state, "in order for the trustee to invoke Missouri's fraudulent conveyance statute, Section 428.020 RSMo. they must show "proof of actual fraud." They cite In re *Pearl D. Swift*, 85 B.R. 96 (Bankr. W.D.Mo. 1988) as support for this statement. The statement is true, and Judge Koger did find proof of actual fraud. The district court affirmed this finding, as did the Eighth Circuit Court of Appeals. Appellant apparently is trying to convince this Court that unless debtor admitted his intent to defraud, then a finding of fraud is improper. That, of course, is not the law.

Actually, the case cited over and over again by appellant, In re *Swift*, 85 B.R. 96, is not particularly relevant here. In noting that "proof of actual fraud" was required, the court was only contrasting § 548(a)(1), which requires "actual" fraud. In re *Swift*, 85 B.R. at 97–98. Here, there is no doubt that the Bankruptcy Court found "actual" fraud. In fact, Judge Koger found "a clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors." In affirming this finding, Judge Collinson of the District Court noed, "the case law. . . indicates that direct proof of the requisite intent is not necessary but may instead be established by circumstantial evidence." Record on Appeal, p. 298 [hereinafter App.Rec.]. he then recited the "badges of fraud" and concluded that, "upon revewing the record, it is obviously apparent that most of the badges of fraud. . . are present in the case." App.Rec., p. 298–299. The Eighth Circuit also reviewed the record, and also affirmed the finding of fraud:

The bankruptcy court did not engage in a detailed

discussion of intent, but fraudulent intent may be inferred from the circumstances of the transactions. [citation omitted] The bankruptcy court found, and the record establishes, that the Gravens entered into numerous transaction in 1985, 1986, and 1987 that, in essence, divested them of virtually all of their assets while leaving their debts unpaid. [citation omitted] Most of those transfers were made for no consideration, with the initial conveyance to a corporation owned by Bobby N. Graven, and a subsequent conveyance of the corporate stock to an irrevocable family trust. [citation omitted] Despite the transfer of livestock and farm equipment, the Gravens continued to possess and use this property. Moreover, in papers submitted to the bankruptcy court, the Gravens denied being parties to a lease although Bobby N. Graven was at that time leasing the livestock and farm equipment from Graven Auction. In addition, the record shows that Bobby N. Graven made an unauthorized transfer of real estate after filing under Chapter 12.

We conclude that the bankruptcy court correctly applied the applicable federal and state law and its finding of fraud is abundantly supported by the record. While the Gravens do not attack the fraud finding as clearly erroneous, we have no hesitation in stating that the bankruptcy court did not clearly err in making this finding. We therefore affirm the district court's order affirming the bankruptcy court's finding of fraud.

App.Rec. 315–316.

As the above–quoted passage makes clear, Judge Koger's finding— that appellant's transfers of property to the corporations and his transfer of the corporate stock to a "family trust" were done with the intent of putting the property out of the reach of creditors—has already been twice reviewed and twice affirmed.

Appellants claim now that when Mr. Graven filed for bankruptcy he had over $900,000 in assets and only about $500,000 in debt. They refer to a "financial statement" attached to their brief, which shows the value of the "Manes Farm" as $800,000. That document, although not identified as such in appellants' brief, appears to be a copy of a financial statement Mr. Graven prepared and filed with Boatmen's Mountain Grove National Bank in December, 1985—approximately two years before he filed his petition for bankruptcy. Deposition Exhibit 24. However, the record shows that in his petition he listed assets in the amount of $202,514 and debt in the amount of $548,878. App. Rec., p. 7, 310.

Furthermore, the Gravens had transferred the Manes Farm, which was their biggest asset, to Graven Auction, but had it transferred back to them upon discovering that there was a "due–on–sale clause" that would have required payment of the mortgage upon transfer of the property. Thus, appellants' claim that the retention of the Manes Farm shows that the Gravens did not intend to defraud anyone is not supported by the record, which shows that the Gravens would not have had ownership of the property at the time of their bankruptcy except for the fact that they did not want to have to pay off the mortgage on the property.

Finally, appellants claim that Judge Koger's ruling is rebutted by evidence showing that the Gravens actually received consideration for a few of the transfers in issue. First, appellants

point out that the Gravens actually received consideration for a few of the transfers in issue. First, appellants point out that the Gravens received stock from the corporations. However, they have failed to show that the stock had any independent value. When a party transfers $50 worth of property to a corporation and receives in exchange a share of stock in a corporation that has, just after the transfer, assets worth only $50, it is very likely that he has done so with the intent of hiding the property from his creditors. Appellants also point out that the Gravens received a benefit because a few of the transfers involved the transfer of debt to Graven Auction along with the property. They refer to Mr. Graven's deposition in which he indicated that Graven Auction assumed debt on two different properties. He referred to "that property [conveyed] to the Buchanans" and "the property in Seymour, Missouri." Bobby N. Graven Dep., p 57. Appellants also refer to a document entitled, "Graven Auction Company, Inc. Section 351 Transfer." That document indicates that several properties which were transferred to Graven Auction had debt attached at the time they were transferred. However, the one entitled "Seymour A & H" had no debt on it, and it is not clear to this Court what other property Mr. Graven referred to in his deposition. It is clear to this Court that only four of the properties transferred had debt attached, and of those four only two of them had more owed on them than they were worth. Those two are referred to in the exhibit as "Lebanon Property" and "Fordland Buchanan 13A," and the total amount by which debt exceeded book value was $8,453. Thus, even if appellants could show that the corporation took the debt which was attached to those properties and thus benefitted the Gravens, the benefit received was so small, comparatively, that it would not change the outcome of this case. In any event, neither Bobby N. Graven's cryptic references in his deposition testimony about debt

transfer, nor appellants' "Exhibit A" (which apparently was not part of the record before Judge Koger) establishes that Judge Koger's finding of fraud was erroneous. Appellants again have not shown, by reference to the record or otherwise, that the finding of fraud was erroneous, and this Court will not now disturb that finding.

Issue 4

Finally, the Court will consider appellants' issue number four. Issue number four involves the transfer of the corporate stock to a Trust. The bankruptcy court found that the transfers of stock were fraudulent. However, they have failed to point to anything in the record that contradicts Judge Koger's ruling. On the contrary, as mentioned above, both Judge Collinson and the Eighth Circuit Court of Appeals affirmed resoundingly Judge Koger's determination that the transfers of stock were done with the intent to defraud creditors. Because appellants have failed to meet their burden of showing that the Bankruptcy Court's ruling was in error, this Court will not disturb that ruling.

CONCLUSION

Appellants have failed to show that Judge Koger's opinion finding that Bobby N. and Millie Graven committed fraud on their creditors is erroneous. The record fully supports Judge Koger's findings and they will be affirmed.

Accordingly, it is hereby

ORDERED that the Judgment entered by the Bankruptcy Court on November 2, 1992 is affirmed.

It is further

ORDERED that the Trustee's motion to strike (doc. #17) is denied.

s/Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

May 09, 1994

APPENDIX I — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

FILED MAY 9, 1994

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Case No. 87-04885-S-2
Adv. No. 89-6057-S-2

In re BOOBY NOAH GRAVEN, and
MILLIE ANN GRAVEN,

GRAVEN AUCTION CO. INC. ET AL.
Appellants,

v.

RICHARD V. FINK, Trustee,
Appellee.

Decision by Court. This action came to a determination before the Court. The issues have been determined and a decision has been reached.

IT IS ORDERED AND ADJUDGED that the judgment entered by the Bankruptcy Court on November 2, 1992 is affirmed; further the Trustee's motion to strike is denied.

05/09/94
Date

R.F. Connor
Clerk
s/ Jane E. Kollmeyer

APPENDIX J - BANKRUPTCY COURT'S MEMORANDUM OPINION FILED OCTOBER 30, 1992

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri
Southern Division

Case No. 87-04885-S-2
Adv. No. 89-6057-S-2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE:

BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN,

Debtors.

RICHARD V. FINK, Trustee,

Plaintiff

v.

BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN, ET AL.

Defendants

Appendix J

This matter started out as a voluntary Chapter 12 filed by Bobby Noah Graven and Millie Ann Graven. Subsequently, when debtors sought to dismiss the case, the Court delayed ruling the motion and instead granted the trustee's motion to convert to Chapter 7. That ruling was subsequently affirmed by the District Court and the Eighth Circuit Court of Appeals. For any detail of the events preceding this hearing, same are fully set out at In re *Bobby Noah Graven & Millie Ann Graven*, 101 B.R. 109; 19 B.C.D. 601 (Bankr. W.D. Mo. 1989), In re *Graven*, 936 F.2d 378 (8th Cir. 1991).

Since that time, Millie Ann Graven is deceased and her estate has been substituted as a party defendant. The instant actions seek sanctions against Bobby Noah Graven as well as certain judgments against him and other defendants. Summary judgment had been sought and was denied. Trial was had on July 17, 1992, and briefing completed by September 15, 1992.

The Court being fully advised in the premises, finds that defendant Bobby N. Graven has failed to comply with orders of this Court concerning the discovery of assets and the payment of monies and property of the estate to the Clerk of the Court and that sanctions should be imposed;

NOW, THEREFORE, IT IS

ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff's motion for sanctions is hereby sustained; sanctions are imposed against defendant Bobby N. Graven. All pleadings filed by defendant Bobby N. Graven in this adversary proceeding are hereby stricken. Judgment as prayed will be entered in favor of the plaintiff and against defendant Bobby N. Graven.

2. Judgment is entered in favor of the plaintiff and against defendant Bobby N. Graven on Count I of plaintiff's Second Amended Complaint as follows:

(a) The transfers of real property, personal property, cashier's checks, cash, and shares of stock as described in Count I of plaintiff's Second Amended Complaint were fraudulent and void and are hereby set aside and held for naught.

3. Judgment is hereby entered in favor of the plaintiff and against defendant Bobby N. Graven on Count II of plaintiff's Second Amended Complaint as follows: That all of defendant Bobby N. Graven's right, title, and interest in and to the real property, personal property, promissory notes, deeds of trust, contracts for deed, cashier's checks, and all other assets described in plaintiff's Second Amended Complaint are assets of this estate and are to be turned over to the plaintiff as Trustee of this estate. Judgment is further entered on Count II of plaintiff's Second Amended Complaint as follows:

(a) The shares of stock in Graven Auction Company, Inc., and Graven Realty, Inc., transferred by defendant Bobby N. Graven are the assets of this estate and are to be turned over to the plaintiff as Trustee of this estate.

(b) Defendant Bobby N. Graven is hereby ordered and directed to account for all assets transferred to any of the other defendants in this litigation and, if not previously described herein, to turn over said assets to the plaintiff as trustee of this estate.

4. Judgment is entered in favor of the plaintiff and against defendant Bobby N. Graven on Count III of plaintiff's Second Amended Complaint as follows:

(a) The transfers of real estate as reflected in the deeds marked Exhibits 2, 6, 8 and 9 to plaintiff's Second Amended Complaint are null and void and said transfers are hereby avoided.

5. Judgment is hereby entered in favor of plaintiff and

against defendant Bobby N. Graven on Count VI of plaintiff's Second Amended Complaint as follows:

(a) Defendant Bobby N. Grave is and was the alter ego of defendants Graven Auction and Graven Realty.

(b) The assets of Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust are the assets of defendant Graven and are to be turned over to the plaintiff.

(c) All books, records, documents, accounting records, and business records of all kinds and types of defendants Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust are the books, records, documents, accounting records, and business records of defendant Bobby N. Graven and are to be turned over to the plaintiff.

(d) Defendant Bobby N. Graven is hereby ordered to account to the plaintiff for all assets.

6. Judgment is entered in favor of plaintiff and against defendant Bobby N. Graven on Count VIII of plaintiff's Second Amended Complaint. The temporary injunction entered in favor of plaintiff and against defendant Bobby N. Graven on September 1, 1989, is hereby made permanent.

7. Judgment is entered in favor of plaintiff and against defendant Bobby N. Graven on Count IX of plaintiff's Second Amended Complaint. Defendant Bobby N. Graven is hereby DENIED a discharge in this bankruptcy proceeding.

8. A hearing on the issues of damages and monies due raised by all counts of plaintiff's Second Amended Complaint will be set at a later date.

SO ORDERED this 30 day of October, 1992.

s/Frank W. Koger CHIEF BANKRUPTCY JUDGE

APPENDIX K – BANKRUPTCY COURT'S JUDGMENT FILED NOVEMBER 2, 1992

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri

Case No. 87-04885-S-2

Adv. No. 89-6057-S-2

RICHARD V. FINK, Trustee,

Plaintiff

v.

BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN, ET AL.

Defendants

This proceeding having come on for trial or hearing before the court, the Honorable FRANK W. KROGER, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

Appendix K

IT IS ORDERED AND ADJUDGED as follows:

1. Plaintiff's motion for sanctions is hereby sustained; sanctions are imposed against defendant Bobby N. Graven. All pleadings filed by defendant Bobby N. Graven in this adversary proceeding are hereby stricken. Judgment as prayed will be entered in favor of the plaintiff and against defendant Bobby N. Graven.

2. Judgment is entered in favor of the plaintiff and against defendant Bobby N. Graven on Count I of plaintiff's Second Amended Complaint as follows:

(a) The transfers of real property, personal property, cashier's checks, cash, and shares of stock as described in Count I of plaintiff's Second Amended Complaint were fraudulent and void and are hereby set aside and held for naught.

3. Judgment is hereby entered in favor of the plaintiff and against defendant Bobby N. Graven on Count II of plaintiff's Second Amended Complaint as follows: That all of defendant Bobby N. Graven's right, title, and interest in and to the real property, personal property, promissory notes, deeds of trust, contracts for deed, cashier's checks, and all other assets described in plaintiff's Second Amended Complaint are assets of this estate and are to be turned over to the plaintiff as Trustee of this estate. Judgment is further entered on Count II of plaintiff's Second Amended Complaint as follows:

(a) The shares of stock in Graven Auction Company, Inc., and Graven Realty, Inc., transferred by defendant Bobby N. Graven are the assets of this estate and are to be turned over to the plaintiff as Trustee of this estate.

(b) Defendant Bobby N. Graven is hereby ordered and directed to account for all assets transferred to any of the other defendants in this litigation and, if not previously

described herein, to turn over said assets to the plaintiff as trustee of this estate.

(Seal of the U.S. Bankruptcy Court)

Date of Issuance: November 2, 1992

4. Judgment is entered in favor of the plaintiff and against defendant Bobby N. Graven on Count III of plaintiff's Second Amended Complaint as follows:

(a) The transfers of real estate as reflected in the deeds marked Exhibits 2, 6, 8 and 9 to plaintiff's Second Amended Complaint are null and void and said transfers are hereby avoided.

5. Judgment is hereby entered in favor of plaintiff and against defendant Bobby N. Graven on Count VI of plaintiff's Second Amended Complaint as follows:

(a) Defendant Bobby N. Graven is and was the alter ego of defendants Graven Auction and Graven Realty.

(b) The assets of Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust are the assets of defendant Graven and are to be turned over to the plaintiff.

(c) All books, records, documents, accounting records, and business records of all kinds and types of defendants Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust are the books, records, documents, accounting records, and business records of defendant Bobby N. Graven and are to be turned over to the plaintiff.

(d) Defendant Bobby N. Graven is hereby ordered to account to the plaintiff for all assets.

6. Judgment is entered in favor of plaintiff and against defendant Bobby N. Graven on Count VIII of plaintiff's Second Amended Complaint. The temporary injunction entered in favor of plaintiff and against defendant Bobby N. Graven on September 1, 1989, is hereby made permanent.

7. Judgment is entered in favor of plaintiff and against defendant Bobby N. Graven on Count IX of plaintiff's Second Amended Complaint. Defendant Bobby N. Graven is hereby DENIED a discharge in this bankruptcy proceeding.

8. A hearing on the issues of damages and monies due raised by all counts of plaintiff's Second Amended Complaint will be set at a later date.

ROBERT F. CONNOR
Clerk of Bankruptcy Court

Date of issuance: November 2, 1992 By: Georgia A. Tarwater

APPENDIX L – BANKRUPTCY COURT'S MEMORANDUM OPINION FILED FEBRUARY 8, 1993

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri
Southern Division

Case No. 87–04885–S–2

Adv. No. 89–6057–S–2

IN RE:

BOBBY NOAH GRAVEN &
BOBBY F. GRAVEN, Personal
Representative of the Estate of Millie Ann
Graven, Deceased,

Debtors.

RICHARD V. FINK, Trustee,

Plaintiff

v.

BOBBY NOAH GRAVEN &
MILLIE ANN GRAVEN, ET AL.

Defendants

Appendix L

On November 2, 1992, this Court entered judgment against Debtor Bobby Noah Graven, et al. in Trustee's adversary complaint asking the Court to deny Graven his bankruptcy discharge and turnover various pieces of real and personal property to the bankruptcy estate. In addition, Trustee asked for damages to compensate the estate for its loss due to Graven's fraudulent conveyance of property. This issue of damages came on for hearing on December 3, 1992.

Trustee claims damages resulting from the transfer of real property as well as damages resulting from the transfer of livestock and other personal property. The real property involved Debtor claimed on his financial statements and the values testified to by the appraiser. The following summarizes how the properties were listed on Debtor's financial statements, the appraiser's testimony, and Trustee's damage claim:

PROPERTY	9/1/84 FIN. STM.	11/10/85 FIN. STM.	7/90 APPR.	DAMAGE CLAIM
Hse./7 ac. Seymour	$125,000	$125,000	$75,000	$50,000
Two 2 BR House–Mt. Grove	$50,000	$50,000	$13,000 $ 5,800	$31,200
Two off. bldg. Mansfield	$72,000	$72,000	$4,000	$68,000
251 ac., Mtn. Grove (½ int.)	$50,000	$50,000	$25,000	$25,000
110 ac., Cabool	$60,000	$60,000	$13,954	$46,046
TOTALS	$357,000	$357,000	$136,754	$220,246

Appendix L

While it is clear to the Court that, under the Bankruptcy Code, it may choose to either give Trustee a money judgment for the value of the property or order turnover of the property, 11 U.S.C. § 550(a) (1988) ("the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property. . . "), it is not clear to the Court that it has authority to order turnover of the property, and, in addition, a money judgement for depreciation. In fact, the Court has been unable to find case authority for such a proposition nor does the Court read § 550 to suggest that such a combination of relief is available. The Court already has ordered turnover of the subject properties. Under § 550, that turnover order is a complete remedy for a fraudulent conveyance action.

Even if such depreciation damages could be awarded in addition to ordering turnover of the property, Trustee has failed to demonstrate that actual depreciation has taken place. Trustee's theory assumes that Debtor's financial statement is a proper reflection of the properties' true value at the time they were transferred. He seeks to base his damage claim on a comparison of financial statement which reflect Debtor's estimate as to the value of the properties as opposed to an appraiser's estimate of value. The origins and uses made of the two different types of valuations are too dissimilar to provide a sufficiently accurate gauge of fluctuation in property values. At best, Debtors' financial statements reflect optimistic guesses at the market value of the properties; certainly the statements reflect some amount of "puffing" to serve the purposes for which the financial statements were given. The Court could give a less charitable interpretation to the fact that Debtor's financial statements reflect values that total $220,246 higher than the appraiser's estimates, but the bottom line is that the Court cannot accept Debtors' financial statements as an accurate gauge of

the properties' values at the time they were transferred. Thus, it is unwilling to base a damage award on those figures. If such damages are available, the Court lacks reliable evidence of the properties' value at the time of transfer and lacks other evidence or facts that would lead the Court to believe that significant depreciation in the value of these properties actually did occur. On that ground alone, the Court must reject that portion of Trustee's damage claim.

The following properties have been transferred to third parties:

PROPERTY	CONSIDERATION RECEIVED
Hse. & 2 acres, Seymour	$49,000 Contract for Deed
3 BR hse., Mtn. Grove	$35,000 Morgan note
Hse. & lot, Seymour	$23,500 Bradley note
40 ac., LeFlore Co., OK	$45,000 cash

The house and two acres in Seymour is apparently still titled to Debtor or an entity under his control and must be turned over to the trustee along with the contract for deed on that property pursuant to the Court's earlier judgment. The three promissory notes are also estate property and must be turned over pursuant to the same judgment along with any proceeds resulting from payments made on those notes. The Court will award Trustee $55,000 damages to compensate for the cash consideration Debtor received on the Fordland and LeFlore County properties.

The Court will also award Trustee $67,086.45. This

represents the proceeds of two sales of cattle by Graven Auction in 1988.

In Count I of his Second Amended Complaint, Trustee pleaded a cause of action for fraudulent conveyance under Missouri state law. Mo. Rev. Stat. 428.020 (1986). The Court's judgment in Trustee's favor on the state law cause of action entitles Trustee to consideration of punitive damages. Punitive damages are appropriate under Missouri law in a state fraudulent conveyance action where the defendants have done a wrongful act intentionally without just cause or excuse. *Lewis v. Barnett,* 694 S.W. 2d 743, 747 (Mo. Ct. App. 1985). The evidence shows that the Gravens engaged in a systematic scheme to defraud their creditors by means of property transfers designed to put that property beyond creditors' reach. The Court finds that their actions were taken with actual intent and without just cause or excuse. The Court, therefore, awards Trustee punitive damages in the amount of $50,000.00.

CONCLUSION

In accordance with the above discussion, the Court awards Trustee actual damages of $122,086.45 and punitive damages of $50,000.00. In addition, the Court clarifies its judgment of November 2, 1992, by including an appendix of legal descriptions of real properties to be turned over to Trustee and hereby orders turnover of these properties.

SO ORDERED this 8th day of February, 1993.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required under Rule 7052, Rules of Bankruptcy.

s/Frank W. Koger

CHIEF BANKRUPTCY JUDGE

APPENDIX M - BANKRUPTCY COURT'S JUDGMENT FILED FEBRUARY 8, 1993

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri
Southern Division

Case No. 87-04885-S-2
Adv. No. 89-6057-S-2

RICHARD V. FINK, Trustee,

Plaintiff

v.

BOBBY NOAH GRAVEN, et al

Defendants

This proceeding having come on for trial or hearing before the court, the Honorable FRANK W. KOGER, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

Appendix M

IT IS ORDERED AND ADJUDGED: In accordance with the above discussion, the Court awards Trustee actual damages of $122,086.45 and punitive damages of $50,000.00. In addition, the Court clarifies its judgment of November 2, 1992, by including an appendix of legal descriptions of real properties to be turned over to Trustee and hereby orders turnover of those properties.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Rule 7052 Rule of Bankruptcy.

ROBERT F. CONNOR
Clerk of Bankruptcy Court

[Seal of the U.S. Bankruptcy Court]

Date of issuance: 2/8/93

By: Georgia A. Tarwater
Deputy Clerk

APPENDIX N — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JUNE 25, 1991

No. 90-1682

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Bobby N. Graven, Personal Representative for the Estate of Millie Ann Graven, Deceased,

Debtors.

Bobby N. Graven; Bobby F. Graven, Personal Representative for the Estate of Millie Ann Graven, Deceased,

Appellants,

v.

RICHARD V. FINK, Trustee,

Appellee.

ON APPEAL from the United States District Court for the Western District of Missouri
Submitted November 16, 1990
Before: MAGILL and JOHN R. GIBSON, Circuit Judges, and HARRIS[1], District Judge.

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[1]The HONORABLE OREN HARRIS, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

Appendix N

JOHN R. GIBSON, Circuit Judge. Bobby Noah Graven and Bobby F. Graven, personal representative for the estate of Millie Ann Graven, Bobby Noah's deceased wife, appeal from the district court's[2] affirmance of a bankruptcy court order granting the trustee's motion under 11 U.S.C. § 1208(d) (1988) to convert the Gravens' Chapter 12 proceeding to Chapter 12 proceeding to Chapter 7, based on a finding of fraud, despite the Gravens' motion to dismiss the case under 11 U.S.C. § 1208(b) (1988). On appeal the Gravens[3] argue that: 1) 11 U.S.C. § 1208(b) creates a right to immediate dismissal of Chapter 12 proceedings upon motion by the debtor; 2) the involuntary conversion to Chapter 7 was improper; 3) the bankruptcy court improperly based its determination of fraud upon the trustee's reports rather than on evidence submitted to that court; and 4) the bankruptcy court failed to make the specific findings necessary to support its ultimate finding of fraud. We are thus presented with an issue of first impression, which is whether under 11 U.S.C. § 1208(d), a court may involuntarily convert a Chapter 12 case to Chapter 7 despite the debtor's request for voluntary dismissal under 11 U.S.C. § 1208(b). We affirm the district court's judgment affirming the bankruptcy court's order to convert the proceedings to Chapter 7.

Before seeking Chapter 12 protection, Bobby N. and Millie Graven had transferred extensive holdings in real and personal to a family-controlled corporation. Bobby N. later transferred the corporation's stock to a family trust. In September 1984, prior to

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[2]The Honorable William R. Collinson, United States Senior District Judge for the Eastern and Western Districts of Missouri.

[3]Millie Ann Graven died on September 28, 1989. The district court substituted Bobby F. Graven as a party defendant in this action on December 7, 1989.

these transfers, the Gravens had claimed a net worth of approximately $1.5 million in a financial statement filed with a bank. In addition to extensive assets in real estate and farm equipment, the Gravens had also accumulated significant debts. When they filed under Chapter 12 in November 1987, they stated that they owed $225,935.84 to unsecured creditors; most of this debt was incurred between 1980 and 1985. In January 1985, the Pillsbury Company obtained a judgment against the Gravens, increasing their debt by $14,871.44.

In that same month, January 1985, Bobby N. Graven incorporated the Graven Auction Co., Inc. He was its president, its sole shareholder, and one of its two directors.[4] On January 16, 1985, the same date that the State of Missouri issued a certificate of incorporation to Graven Auction, Bobby N. executed a series of deeds conveying his interest in several tracts of real estate to Graven Auction. These conveyances were recorded within 30 days.[5]

In January 1986, Millie Graven executed quit claim deeds purporting to convey her interest in the same tracts.[6] Some of these deeds were recorded in February 1986, but others were not recorded until February 1987. Graven Auction paid no monetary consideration to either of the Gravens for the real estate, despite the fact that in January 1985, the Gravens owed approximately

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[4]Joanne Lashua, Bobby N. Graven's secretary, was elected the second director and secretary of the corporation.

[5]The bankruptcy court later valued a portion of the real estate conveyed to Graven Auction (including two tracts conveyed in 1986) at $476,000. In re *Graven*, 101 B.R. 109, 113 (Bankr. W.D. Mo. 1989).

[6]The record is not clear as whether the Gravens owned any of the real estate individually or as tenants by the entireties, joint tenants, or tenants in common.

$500,000 to creditors.

In January 1986, Bobby N. Graven executed a quit claim deed transferring another tract of real estate to Graven Auction. That same month, Bobby N. and Millie Graven executed a bill of sale conveying all of their livestock (including 169 head of daily cattle) and farm equipment except for a feed mill to Graven Auction. Graven Auction paid no consideration for this property, and it later leased the livestock and equipment back to Bobby N. Graven at favorable rates that were later reduced. Bobby N. acted as both the lessee and as president of the lessor corporation. The bankruptcy court found that between January 1986 and March 1988, the debtors were in full control and possession of the property. In re *Graven,* 101 B.R. at 110. During a Rule 2004 examination in December 1988, Bobby N. Graven stated that the lease with Graven Auction had been terminated the month before. The termination was without the permission of the bankruptcy court, and the location of the property is now unclear.

Also in January 1986, Bobby N. Graven transferred for no consideration all outstanding shares of stock in Graven Auction, and all but three of the 285 shares of stock in Graven Realty, another corporation that he controlled, to an irrevocable family trust. He retained the voting rights to the stock during his lifetime. The trust document named one of the Gravens' sons, Bobby F. Graven, as trustee, and named all three Graven children, Bobby F., Daniell N. and Gayla A. Graven, as beneficiaries.

On November 15, 1986, Bobby N. and Millie Graven executed a quit claim deed, which was recorded four days later, conveying their interest in another tract of land to Graven Auction. Several days earlier, on November 10, Bobby N. Graven had executed a quit claim deed conveying to Graven Auction his interest in the surface estate of a tract in LeFlore County,

Ok[illegible]oma. That deed was not recorded until November 10, 1987. Two days later, on November 12, 1987, Bobby N. and Millie Graven filed their Chapter 12 bankruptcy petition. On November 17, 1987, five days after the Chapter 12 filing, Bobby N. Graven executed a quit claim deed conveying to Graven Auction his interest in the mineral rights in the Oklahoma property. That deed was recorded on November 20, 1987.

Bobby N. and Millie Graven had operated their farm on property called the "Manes Farm," seven hundred acres in Wright County, Missouri. Millie Graven claimed Manes Farm as her permanent residence, and Bobby N. has also claimed to reside there. Along with their other real estate, the Gravens had conveyed Manes Farm to Graven Auction, with Bobby N. first conveying his interest in various Manes Farm tracts and Millie Graven later purporting to transfer her interest by separate deeds.[7] Graven Auction later conveyed Manes Farm back to Bobby N. Graven through a series of quit claim deeds that bore January 1986 execution dates but were not recorded until November 10, 1987, two days before the bankruptcy filing.

Following all of these transfers, the only property owned by Bobby N. and Millie Graven was the Manes Farm and the feed system. In their Chapter 12 filing, the Gravens listed debts of $527,437.72 and assets of $202,514.22.

In January 1988, the Gravens filed a plan of reorganization. The Federal Land Bank of St. Louis, a secured creditor, objected to the plan and, along with another creditor, requested that the bankruptcy court order the trustee to investigate the Gravens' actions. In a February 1988 motion, the Federal Land Bank alleged that the Gravens' transfers to closely-held corporations and the

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[7]*See* footnote 5.

family trust may have been fraudulent and therefore voidable. On March 23, 1988, following an evidentiary hearing earlier that month, the bankruptcy court ordered the trustee to investigate the possibility that the Gravens had committed fraud under the bankruptcy code or Missouri law. In re *Graven*, 84 B.R. 630, 631–32 (Bankr. W.D. Mo. 1988). The trustee submitted a preliminary investigation report on November 18, 1988, and a supplemental preliminary report on January 20, 1989. The first report described in detail the Gravens' transactions and alleged that the debtors had transferred property with the intent to "hinder, delay and defraud" their creditors. The report recommended instituting proceedings to set aside the alleged fraudulent transfers. The second report provided information about more of the Gravens' transactions and sought to set aside those transfers as well.

At a January 24, 1989, hearing to consider the trustee's reports, the Gravens moved to dismiss their Chapter 12 proceedings under 11 U.S.C. § 1208(b). The trustee subsequently filed a motion to convert the case to Chapter 7 based on the alleged fraud by the Gravens. Following a hearing on April 10, 1989, the bankruptcy court filed its order which held that the Gravens had engaged in a "clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud [their] creditors. . . In re *Graven*, 101 B.R. at 111. Finding that the Gravens had engaged in both prepetition and postpetition misconduct, the bankruptcy court granted the trustee's motion for conversion under 11 U.S.C. § 1208(d) (1988), which states that the court may dismiss a Chapter 12 case or convert it to Chapter 7 upon a showing that the debtor has committed fraud. Id. at 113.

The court further held that its decision rendered the Gravens' motion to dismiss moot. Id. It rejected the Gravens' argument that subsection 1208(b) mandates immediate dismissal

upon request of the debtor. The court held that it may convert a case to Chapter 7 despite the debtor's petition for dismissal if fraud is established and "the public good requires" conversion. Id. at 112–13.

Reviewing de novo the bankruptcy court's ultimate finding of fraud, the district court affirmed that finding based on the presence of numerous "badges of fraud." *Graven v. Fink*, No. 89–3587–CV–S–2, slip op. at 7–10 (W.D. Mo. March 29, 1990). The district court particularly noted the transfers of property for little or no consideration occurring when the Gravens owed approximately $500,000 to creditors, the Gravens' possession and use of the property following the transfers, the misrepresentations in the statements the Gravens submitted to the bankruptcy court, and the transfer of the mineral rights to the Oklahoma property after the filing of the petition. Slip op. at 9–10. The district court then affirmed the bankruptcy court's conversion of the case to Chapter 7. Slip op. at 12–14.

I.

As the fraud finding provided the basis for converting this case to Chapter 7 under 11 U.S.C. § 1208(d), we first discuss the predicate issue of fraud. The Gravens make a generalized attack on the finding of fraud, but do not argue that the finding is clearly erroneous and do not address whether this is the appropriate standard of review. The district court reviewed the fraud finding de novo. Slip op. at 7–10.

The clearly erroneous standard of review applies to facts found by a bankruptcy court. *See Wegner v. Grunewaldt*, 821 F.2d 1317, 1320 (8th Cir. 1987); *Martin v. Bank of Germantown*, 761 F.2d 1163, 1164 (6th Cir. 1985). In a case originating in bankruptcy court, the court of appeals acts as a second court of review, and reviews the bankruptcy court's conclusions under the

same standards applied by the district court. *Wegner*, 821 F.2d at 1320.

A finding of fraud under the bankruptcy code is, we believe, a factual matter. *See Norwest Bank Nebraska, N.A. v. Tveten*, 848 F.2d 871, 874 (8th Cir. 1988) (a finding of intent to defraud under the bankruptcy code may be reversed on appeal only if clearly erroneous); *T & B Gen. Contracting, Inc. v. Ballenger Corp.*, 833 F.2d 1455, 1458–60 (11th Cir. 1990). While we conclude that the clearly erroneous standard properly applies, we recognize that in certain instances a finding of fraud may involve questions of law that simply are not presented in this case.

In attacking the fraud finding, the Gravens first contend that the bankruptcy court improperly considered the trustee's reports as evidence of fraud without testimony to substantiate the reports' conclusions.

This argument simply lacks merit. The bankruptcy court issued its order after holding an extensive hearing on April 10, 1989. At that hearing, the court considered 93 exhibits offered by the bankruptcy trustee. The Gravens offered no evidence at the hearing. Among the exhibits admitted by the bankruptcy court were transcripts from the Rule 2004 examinations, all depositions taken in the case, a transcript of the March 2, 1988, confirmation hearing, and certified copies of the many deeds showing real estate conveyances by the Gravens. Although the bankruptcy court's opinion referred to the trustee's reports, the opinion establishes that the court considered testimony at the various hearings and that it also reviewed the schedules and statements of affairs submitted by the Gravens. *See* 101 B.R. at 110–111. The Gravens' argument that the bankruptcy court improperly based its conclusion on the trustee's reports without independently evaluating the extensive evidence is simply contrary to the record before us.

Appendix N

The Gravens next contend that the bankruptcy court's finding of fraud is a "general conclusion" made without reference to a specific statute and not supported by specific findings of fact.

The bankruptcy court's opinion recites extensive factual findings supporting its ultimate finding of fraud: 1) the lack of monetary consideration paid by Graven Auction to the Gravens for the transfers of real estate; 2) the leasing of livestock and farm equipment from Graven Auction after transferring this property for no consideration to Graven Auction; 3) the transfer of various deeds of trust, promissory notes and accounts receivable to Graven Auction; 4) the reconveyance of the Manes Farm back to the Gravens just before the Chapter 12 filing; 5) the transfer of Graven Auction stock and Graven Realty stock to the irrevocable family trust and the retention of lifetime voting rights in the corporations' stock by Bobby N. Graven; 6) the testimony by Bobby F. Graven, the stated trustee of the family trust, who said he had done nothing to manage the assets of the trust; 7) false statements in documents submitted to the bankruptcy court in which the Gravens failed to disclose the property leased from Graven Auction and stated that they were not parties to any leases; 8) the transfer of the mineral rights to the Oklahoma property after the bankruptcy filing; 9) the transfers of certain property that were not completed until February 1987, bringing them within the one-year period before the filing of the bankruptcy petition; 10) the apparent receipt by the Gravens of proceeds from the sale of three cows after they had allegedly conveyed the cows to Graven Auction. 101 B.R. at 110–111.

We are satisfied that the bankruptcy court thoroughly considered the relevant evidence and issued detailed findings of fact based on that evidence. The Gravens do not attack any of these specific findings as clearly erroneous.

The bankruptcy court applied the relevant statutory standard

when it found a "clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors." 101 B.R. at 111. The "hinder, delay and defraud" standard is found in both 11 U.S.C. § 548(a) (1988) and Mo. Rev. Stat. § 428.020 (1978).

11 U.S.C. § 548(a) gives the trustee the power to avoid a fraudulent conveyance made within the one-year prepetition period if the debtor "made such transfer. . . with actual intent to hinder, delay or defraud any entity to which the debtor was or became. . indebted. . ." (Emphasis added).

Under 11 U.S.C. § 544(b) (1988), state law is applicable in federal bankruptcy proceedings.[8] Mo. Rev. Stat. § 428.020 (1986) uses the same standard as 11 U.S.C. § 548(a) states: "Every conveyance. . . made or contrived with the intent to hinder, delay or defraud creditors. . . shall be. . . as against said creditors. . . clearly and utterly void." (Emphasis added).

The bankruptcy court did not engage in a detailed discussion of intent, but fraudulent intent may be inferred from the circumstances of the transactions. *Allison v. Mildred*, 307 S.W. 2d 447, 454 (Mo. 1957).[9] The bankruptcy court found, and the record

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[8]Subsection 544(b) grants the trustee the power to avoid certain transfers of the debtor to the extent that a creditor with an allowable claim might avoid them under applicable state or federal law. 4 Collier on Bankruptcy, ¶ 544.03 at 544-15 (L. King ed. 1990). *See also Landbank Equity Corp. v. Runnells* 83 B.R. 362, 380 (E.D. Va. 1987).

[9]*Allison* states that a "strong inference of fraud arises from a concurrence of several badges of fraud; such as [a] conveyance in anticipation of a suit; a conveyance to near relatives; inadequacy of consideration; unusual clauses in instruments or unusual methods of transacting business; transfer of al or nearly all of a debtor's property; insolvency; retention of possession by the debtor; [and] the failure to produce available explanatory or rebutting evidence. . . " 307 S.W. 2d

establishes, that the Gravens entered into numerous transactions in 1985, 1986, and 1987 that, in essence, divested them of virtually all of their assets while leaving their debts unpaid. *See Brown v. Oehler*, 192 S.W.2d 515, 517 (Mo. Ct. App. 1946). Most of those transfers were made for no consideration, with the initial conveyance to a corporation owned by Bobby N. Graven, and a subsequent conveyance of the corporate stock to an irrevocable family trust. *See Vaughn v. Christian*, 472 S.W.2d 337, 338 (Mo. 1971) (conveyance lacking consideration is presumptively void against existing creditors). Despite the transfer of livestock and farm equipment, the Gravens continued to possess and use this property. Moreover, in papers submitted to the bankruptcy court, the Gravens denied being parties to a lease although Bobby N. Graven was at that time leasing the livestock and farm equipment from Graven Auction. In addition, the record shows that Bobby N. Graven made an unauthorized transfer of real estate after filing under Chapter 12. *See* 11 U.S.C. § 549(a) (1988).

We conclude that the bankruptcy court correctly applied the applicable federal and state law and its finding of fraud is abundantly supported by the record. While the Gravens do not attack the fraud finding as clearly erroneous, we have no hesitation in stating that the bankruptcy court did not clearly err in making this finding. We therefore affirm the district court's order affirming the bankruptcy court's finding of fraud.

II.

We must now determine how the two subsections of 11 U.S.C. § 1208 interact. Subsection 1208(b) appears to mandate

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at 454. *See also Community Federal Sav. & Loan Ass'n v. Boyer*, 710 S.W.2d 332, 334 (Mo. Ct. App. 1986).

dismissal upon request of the debtor-farmer:[10]

> "On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."

(Emphasis added). Subsection 1208(d), in contrast, uses permissive terms:

> "On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

(Emphasis added).

The Gravens assert that notwithstanding the conversion power granted the court by subsection 1208(d), the express language of subsection 1208(b) mandates immediate dismissal upon the debtor's request. The Gravens further argue that the bankruptcy code, in particular Chapter 12, grants farmers[11] special protections and that allowing involuntary conversion to Chapter 7 despite the debtor's requested dismissal would erode farmers' rights under the code. They finally argue that at the time they moved for dismissal, there was no finding of fraud. A bankruptcy court, they assert, should not be permitted to hold a motion for dismissal in abeyance

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[10]Chapter 12 of the bankruptcy code applies to family farmers.

[11]There is no dispute that the Gravens are farmers within the meaning of Chapter 12, although the record reflects more sophisticated business transactions than Chapter 12 may have been designed to reach.

long enough for an investigation of alleged fraud to be conducted.

Both the bankruptcy court and the district court rejected the Gravens' arguments, concluding that the overall purpose of the bankruptcy code is best served by a statutory interpretation that allows the bankruptcy court to convert a case to Chapter 7 if fraud is shown, even though the debtor moved for a dismissal. In re *Graven*, 101 B.R. at 112–113; *Graven*, district court slip op. at 11–14. The interpretation of a statute is a question of law for the trial court, subject to do novo review on appeal.

The express language of 11 U.S.C. §§ 1208(b) and (d) indeed raises a potential conflict. When interpreting a statute we look not only to the express language, however, but also to the overall purpose of the act. The Supreme Court has directed that we not "construe statutory phrases in isolation." *United States v. Morton*, 467 U.S. 822, 828 (1984). We must also consider "the design of the statute as a whole and. . . its object and policy." *Crandon v. United States,* 110 S. Ct. 997, 1001 (1990). *See also Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve"); *Kifer v. Liberty Mut. Ins. Co.,* 777 F.2d 1325, 1332 (8th Cir. 1985) ("[T]o ascertain such legislative intent, we may properly consider not only the language of the statute but also the subject matter, the object to be accomplished, the purpose to be served, the underlying policies, the remedy provided, and the consequences of various interpretations").

The purpose of the bankruptcy code is to provide a "fresh start" for insolvent debtors. *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991). The opportunity for a "completely unencumbered new beginning," however, is not available to all, but is limited to the "'honest, but unfortunate debtor.'" Id. at 659 (quoting *Local Loan*

Co. v. Hunt, 292 U.S. 234, 244 (1934)).

The Supreme Court's statements make clear that the purpose of the bankruptcy code is to protect the honest debtor, not to provide a shield for those who exploit the code's protection then seek to escape judicial authority when their fraudulent schemes are exposed. As the district court in this case aptly stated:

> "To adopt the interpretation of § 1208(b) and (d) favored by the debtors. . .would lead to endless abuse of the bankruptcy process. . . and would clearly thwart the clear purpose of Chapter 12, which is to provide relief for the honest debtor, and the intent of Congress in adopting § 1208(d).

Graven, slip op. at 12 (citation omitted).

Recognizing an absolute right to dismissal under subsection 1208(b) would also completely undermine the express authority Congress granted the courts under subsection 1208(d) and would render that subsection useless. *See id.* The Gravens argue that Congress, by adopting Chapter 12, intended to afford the farmer special protections. Chapter 12 does indeed reflect Congress' intent to bestow favorable treatment on insolvent farm families. Congress also intended, however, to balance farmers' needs with creditors' rights. The House Conference Report states that Chapter 12 "offers family farmers the important protection from creditors of the system and ensuring that farm lenders receive a fair repayment." H.R. Conf. Rep. No. 99-958, 99th Cong., 2d Sess. 48, reprinted in 1986 U.S. Code Cong. & Admin. News 5246, 5249 (emphasis added).

The legislative history on subsection 1208 is scant. One statement by Senator Grassley appears in the Congressional Record: "If fraud is found, the case will be dismissed or converted to Chapter 7. This encourages good faith, [sic] and honest dealing by

the debtor throughout the case." 132 Cong. Rec. 28,593 (1986).

We conclude that the broad purpose of the bankruptcy code, including Chapter 12, is best served by interpreting subsection 1208(d) to allow a court to convert a case to Chapter 7 upon a showing of fraud even though the debtor has moved for dismissal under subsection (b). Our holding on the interaction of subsections (b) and (d) does not conflict with the express language of (b). Nothing in subsection (b) requires that a court act immediately upon a debtor's request for a voluntary dismissal. *See* In re *Tyndall*, 97 B.R. 266, 268 (Bankr. E.D.N.C. 1989) (a court may delay action on a 1208(b) motion while it considers motions by other parties). Once fraud is found, the provisions of subsection 1208(d) are triggered and the court has the authority, under subsection (d), to dismiss the case or convert it to Chapter 7.

Other than the lower courts' decisions in this case, only one reported decision addresses the potential conflict between subsections 1208(b) and 1208(d). In *Foster v. North Texas Production Credit Association*, 121 B.R. 961 (N.D. Tex. 1990), the district court issued a brief opinion stating:

> "When the facts show that the debtors have abused the legal process and the bankruptcy process through fraud, the bankruptcy court has the authority to convert a chapter 12 proceeding to a chapter 7 liquidation, even though the debtors have filed a motion to dismiss the chapter 12 proceeding."

Id. at 961 (citing In re *Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989).

In re *Zurface*, 95 B.R. 527 (Bankr. S.D. Ohio 1989), while not addressing the debtor's right to a dismissal under 1208(b), does shed some light on the purpose and proper interpretation of

subsection 1208(d). Similar to the case before us, the debtors in *Zurface* had transferred most of their assets for inadequate consideration to a family-controlled corporation before filing under Chapter 12. 95 B.R. at 536-38. After finding that the debtors had committed fraud, the bankruptcy court refused confirmation of the debtors' Chapter 12 plan, then converted the case to Chapter 7 pursuant to 11 U.S.C. § 1208(d). Id. at 538-39. The debtors had not filed a motion for dismissal subsection 1208(b). The court concluded that "relief under Chapter 12 is available only to the honest debtor who is making a sincere effort to repay creditors." Id.

Our holding is thus consistent with the few cases that have construed the meaning and purpose of subsections 1208(b) and (d). It also is consistent with the interpretation some bankruptcy courts have accorded 11 U.S.C. §§ 1307(b) and (c) (1988), the analogous provisions in Chapter 13. In In re *Vieweq,* 80 B.R. 838 Bankr. E.D. Mich. 1987), the bankruptcy court rejected the argument that subsection 1307(b) provides an unfettered right to voluntary dismissal. Id. at 843. Upon a showing that the debtor had exploited the bankruptcy laws to his advantage without demonstrating any intent to comply with court orders, to restructure his debt or pay creditors, the court converted the case to Chapter 7 despite the debtor's motion for dismissal. Id. at 843-44. Other bankruptcy courts have also rejected the view that subsection 1307(b) provides an absolute and immediate right to dismissal. *See* In re *Tatsis*, 72 B.R. 908, 910 (Bankr. W.D.N.C. 1987); In re *Gaudet,* 61 B.R. 349, 350 (Bankr. D.R.I. 1986); In re *Powers*, 48 B.R. 120, 121 (Bankr. M.D. La. 1985); In re *Jacobs*, 43 B.R. 971, 975-76 (Bankr. E.D.N.Y. 1984); but *see* In re *Gillion*, 36 B.R. 901, 905-06 (E.D. Ark. 1983) (debtor has an absolute right to a dismissal before conversion); In re *Looney*, 90 B.R. 217, 218 (Bankr. W.D. Va. 1988) (court cannot convert Chapter 13 case to Chapter 7 if the

debtor has filed motion for dismissal).

Moreover, Bankruptcy Rule 1017(a) expressly provides for notice and a hearing before action on a motion for voluntary dismissal:

> "Except as provided in §§ 707(b) and 1307(b) of the Code, a petition shall not be dismissed on motion of the petitioner or for want of prosecution or other cause or by consent of the parties prior to a hearing on notice to all creditors as provided in Rule 2002(a). . ."

Rule 1017(a) was last amended in March 1987, five months after Congress enacted Chapter 12. At that time, subsection 707(b) was added to the "except" clause. The failure of Congress to include subsection 1208(b) in that same clause indicates that Congress intended for the hearing and notice provisions to apply to creditors of Chapter 12 debtors.

Finally, the Gravens disingeniously argue that at the time they filed their motion to dismiss "no allegations of fraudulent conduct were asserted." This statement is simply false. The Gravens requested dismissal at the beginning of January 24, 1989, hearing scheduled to consider the trustee's reports, which were filed on November 18, 1988, and January 20, 1989. Those reports clearly alleged fraud and recommended that the trustee be authorized to initiate proceedings to set aside certain transfers. Moreover, in its March 23, 1988, order, the bankruptcy court discussed at length evidence presented at a confirmation hearing that examined the Gravens' various conveyances of real and personal property. The order specifically noted the allegations of fraud and concluded: "The Court assumes that it will come as no surprise to anyone who has read this far, that the Court does direct that . . .the Chapter 12 Trustee. . . conduct an investigation." In re *Graven*, 84 B.R. at 631.

Appendix N

The Gravens filed their motion to dismiss one year and seventy-three days after filing their Chapter 12 petition. Having enjoyed the code's protection for that period of time, they abruptly sought dismissal just as the bankruptcy court prepared to hear the evidence of their wrongdoing. We are convinced that the broad purposes of the bankruptcy code are not served by such cynical manipulation of the bankruptcy process. We therefore hold that once fraud has become an issue in a case, the court may delay action on a 1208(b) motion for dismissal long enough to allow an investigation of the alleged fraud. If fraud is shown, the court may, under 11 U.S.C. § 1208(d), convert the Chapter 12 case to Chapter 7 despite the debtor's motion to dismiss.

For the foregoing reasons, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX O — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 12, 1991

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1682WM

In re: Bobby N. Graven; Bobby F. Graven, Personal Representative for the Estate of Millie Ann Graven, Deceased,

Debtors.

Bobby N. Graven; Bobby F. Graven, Personal Representative for the Estate of Millie Ann Graven, Deceased,

v.

RICHARD V. FINK, Trustee,

Appellee.

Appendix O

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 25, 1991

The appellee shall recover from the appellant the sum of $101.97 as costs on appeal.

A true copy.

ATTEST: s/Michael E. Gans, Acting Clerk by

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 7/16/91

APPENDIX P — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION FILED MARCH 29, 1990

No. 89-3387-CV-S-2

BOBBY NOAH GRAVEN and
BOBBY F. GRAVEN, Personal Representative of the
Estate of MILLIE ANN GRAVEN, Deceased,

Debtors-Appellants,

v.

RICHARD V. FINK, Trustee,

Appellee.

Memorandum Opinion

Appendix P

The present matter is before the Court on the appellants' appeal from an interlocutory order of the United States Bankruptcy Court for the Western District of Missouri dated May 22, 1988.[12] On that date, the Bankruptcy Court determined pursuant to 11 U.S.C. § 1208(d) that the debtors had committed fraud in connection with the case and ordered that the Chapter 12 case be converted to a Chapter 7 liquidation bankruptcy despite the fact that debtors had sought voluntary dismissal of the proceedings pursuant to 11 U.S.C. § 1208(b). The order of the Bankruptcy Court is hereby affirmed.

The following issues are presented in the case:

(1) Did the Bankruptcy Court err in determining pursuant to 11 U.S.C. § 1208(d) that the debtors-appellants committed fraud in connection with the case?

(2) Whether the Bankruptcy Court erred in converting the proceedings from Chapter 12 to Chapter 7 after the debtors-appellants moved to voluntarily dismiss the Chapter 12 proceedings pursuant to 11 U.S.C. § 1208(b)?

The Bankruptcy Court's findings of fact are not to be overturned unless clearly erroneous. In Re Martin, 761 F.2d 472 (8th Cir. 1985). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Company, 333 U.S. 364, 395 (1948). Findings of fact are

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[12]The Honorable Frank Koger, United States Bankruptcy Court of the Western District of Missouri.

also considered clearly erroneous when they are (1) not supported by substantial evidence; (2) contrary to the clear preponderance of the evidence; or (3) based upon an erroneous view of the law. In Re Cook, 72 B.R. 976 (W.D. Mo. 1987). A finding that transfers of property were made with the intent to hinder, delay or defraud creditors has been held to be a finding of fact to be reviewed under the clearly erroneous standard. In Re Roco Corp., 701 F.2d 978, 981 (1st Cir. 1983). The Bankruptcy Court's conclusions of law are subject to de novo review. Martin, supra, at 474.

I. FACTS

In September of 1984, the debtors issued a financial statement to Boatmen's National Bank of Mountain Grove, Missouri showing a net worth of $1,526,373. In late 1985, the debtors issued a financial statement to the Federal Land Bank showing assets of over one million dollars.

In January of 1985, debtor Bobby N. Graven, a real estate broker, appraiser and farmer, incorporated a Missouri corporation known as Graven Auction Company, Inc. Debtor Bobby N. Graven was the sole incorporator of the corporation. He initially held all of the corporation's issued stock. He was elected president of the corporation. Joanne Lashua, debtor Bobby N. Graven's secretary, was named the second director and secretary of the corporation. In that same month, Pillsbury Company, a creditor, obtained a substantial judgment against debtor Bobby N. Graven.

On January 16, 1985, debtor Bobby N. Graven conveyed by warranty deeds his interest in a number of pieces of real estate to Graven Auction Company, Inc. the deeds were recorded within thirty days. In January of 1986, debtor Millie A. Graven conveyed by warranty deeds her interest in various tracts of real estate to Graven Auction Co., Inc. Some of these deeds were recorded in February 1986 while other deeds were recorded in February 1987.

Appendix P

There is no indication that any monetary consideration for the transfers was paid to the debtors by Graven Auction Company, Inc. One piece of real estate known as the Manes farm was conveyed by quit claim deed back to debtor Bobby N. Graven. The deed was not recorded until shortly before the debtors filed their bankruptcy petition in November of 1987. The debtors testified that this property was transferred back to them by Graven Auction Company, Inc. because the property was subject to a deed of trust, which contained a due on sale clause.

In January of 1986, the debtors executed a bill of sale transferring all livestock and farm equipment with the exception of a feed mill to Graven Auction Company, Inc. Debtors received no consideration for this transfer. The livestock and farm equipment were subsequently leased back to debtors at favorable rental rates, which were later reduced. Debtor Bobby N. Graven executed the leases on behalf of Graven Auction, Inc. in his capacity as president of the corporation. The leases were subsequently terminated in November of 1988 and the location of this property is in question.

On January 1, 1986, Bobby N. Graven transferred all outstanding shares of stock in Graven Auction Company, Inc. and 282 shares of stock in Graven Realty, Inc. to an Irrevocable Trust. Bobby F. Graven, son of the debtors, was named Trustee of the Irrevocable Trust. The named beneficiaries of the Irrevocable Trust are the three children of the debtors. Debtor Bobby N. Graven retained the voting rights to the shares of stock in both corporations for life. Also in January of 1986, debtor Bobby N. Graven executed a quit claim deed transferring a tract of real estate in Webster County, Missouri to Graven Auction Company, Inc.

Prior to the filing of the bankruptcy petition, a number of promissory notes, deeds of trust, contracts for deed, and additional

obligations owed the debtors were transferred to Graven Auction Company, Inc. As a result, substantial amounts of money were transferred from the debtors to Graven Auction Company, Inc.

On November 15, 1986, debtors executed a quit claim deed conveying their interest in property located in Texas County, Missouri to Graven Auction Company, Inc. The deed was recorded on November 19, 1986.

On November 10, 1986, debtor Bobby N. Graven executed a quit claim deed conveying his interest in the surface estate of real estate located in LeFlore County, Oklahoma to Graven Auction Company, Inc. The deed was recorded on November 10, 1987. On November 20, 1987, debtor Bobby N. Graven recorded a deed conveying his interest in the mineral rights to the Oklahoma property to Graven Auction Company, Inc.

Following the transfers described above, the only remaining property owned by the debtors was the Manes farm and the feed system. Their liabilities exceeded their assets by $200,000.

The appellant–debtors filed their Chapter 12 petition on November 12, 1987. In conjunction with the filing of the bankruptcy petition, debtors filed schedules indicating they had a total unsecured debt of $225,935.67. Farm Credit Services held a claim of $238,687.66 secured by a deed of trust.

On January 29, 1988, the debtors filed a Plan of Reorganization. Creditors Federal Land Bank of St. Louis and Mercantile Wright County Bank objected to the plan. Creditor Federal Land Bank of St. Louis requested that the Court order an investigation by the Chapter 12 Trustee of the debtors' activities. On March 23, 1988, the Bankruptcy Court issued an order directing the Chapter 12 Trustee to conduct an investigation.

Subsequently, the Trustee filed a Preliminary Investigation Report on November 18, 1988 and a Supplemental Preliminary

Investigation Report on January 20, 1989. In said reports, the Trustee concludes that the debtors transferred property in fraud of their creditors. As a result, the Trustee sought authority from the Court to set aside various transfers.

The Bankruptcy Court set a hearing for January 24, 1989 to consider the Trustee's Report. At said hearing, debtors orally moved the Bankruptcy Court to dismiss the case pursuant to 11 U.S.C. § 1208(b). The Trustee subsequently filed a motion to convert the case to Chapter 7. Following an additional hearing, the Bankruptcy Court determined the debtors had committed fraud in connection with the case and filed its order converting this case to Chapter 7. The debtors subsequently filed their notice of appeal.

The first issue to be reviewed by this Court is the Bankruptcy Court's determination that the debtors-appellants committed fraud in connection with the case pursuant to 11 U.S.C. § 1208(d). An interesting issue to be resolved is which standard of review is to be utilized in reviewing this issue. The appellee has cited a case holding that a finding of fact to be reviewed under the "clearly erroneous" standard. *See* In re McNeeley, 25 B.R. 289 (W.D. Ark. 1982). The appellee therefore argues that the Bankruptcy Court's finding that the debtors committed fraud in connection with the case should be reviewed under the "clearly erroneous" standard. The appellant failed to favor the Court with suggestions as to the appropriate standard of review. Nevertheless, this Court is of the opinion that the Bankruptcy Court's ultimate determination that the debtors-appellants committed fraud in connection with the case is a conclusion of law. Underlying findings of fact supporting this conclusion may be reversed only if they are clearly erroneous. The Court concludes, however, than under either standard of review the Bankruptcy Court's conclusion should be affirmed.

Appendix P

The conclusion of the Bankruptcy Court that debtors committed fraud in connection with the case is largely based upon its finding that the debtors conveyed their property with an intent to hinder, delay, or defraud their creditors. Applicable statutes include 11 U.S.C. § 548, which, in part, provides:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> > (1) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> >
> > (2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> >
> > (3)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> >
> > (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
> >
> > (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

In addition, the provisions of 11 U.S.C. § 544(b) appear to

make Missouri's fraudulent conveyance statute, § 428.020 RSMo., applicable to this case. Section 428.020 RSMo. states, in part, as follows:

> Every conveyance or assignment in writing, or otherwise, of any estate or interest in lands, or in goods and chattels, or in things in action, or of any rents and profits issuing therefrom . . . made or contrived with the intent to hinder, delay, or defraud creditors of their lawful actions, damages, forfeitures, debts, or demands . . . shall be from henceforth deemed and taken, as against said creditors and purchasers prior and subsequent, to be clearly and utterly void.

The case law interpreting both 11 U.S.C. § 548 and § 428.020 RSMo. indicates that direct proof of the requisite intent is not necessary but may instead be established by circumstantial evidence. The so-called badges of fraud utilized by the Courts to determine whether the requisite intent exists include "a conveyance in anticipation of suit; a conveyance to near relatives; inadequacy of consideration; unusual clauses in instruments or unusual methods of transacting business; transfer of all or nearly all of a debtor's property; insolvency; retention of possession by the debtor; and the failure to produce available explanatory or rebutting evidence when the circumstances attending the transfer are suspicious." Allison v. Mildred, 307 S.W.2d 447, 454, (Mo. 1957). Additional factors include concealment of facts and false pretenses by the transferor; absconding with or secreting proceeds or a transfer immediately after their receipt; a transfer for no consideration where the transferor and the transferee have knowledge of the claims of creditors and know the creditors cannot be paid; the fact that the transfer was made to satisfy or secure a debt long since forgiven; and the creation by an oppressed debtor of a closely-held corporation to receive the transfer of his property. *See* 4 Collier on

Bankruptcy, ¶ 548.02[5].

Upon reviewing the record, it is obviously apparent that most of the badges of fraud listed above are present in this case. In January of 1985, the debtor incorporated a closely-held corporation and voluntarily transferred virtually all of their property to the corporation for little or no consideration. Further, the testimony indicates that the debtors were fully aware that at the time the transfers took place they owed approximately $500,000 to various creditors and Pillsbury Company had just obtained a substantial judgment against them. Following the transfers, the debtors' liabilities exceeded their assets by approximately $200,000. In addition, the debtors retained possession of the property following the transfers and treated the property as their own. It certainly may be argued that the debtors' method of conducting business is very unusual. Further, the debtors produced no real evidence rebutting the notion that the assets were transferred with the intent to defraud creditors. The debtors testified that the transfers to the corporation and irrevocable trust were to preserve something for their children. The debtors were obviously concerned that if their property went to their creditors nothing would be preserved for their children. In addition, it is curious that the testimony indicates that two of the children were never told of the Trust's creation, that debtor Bobby N. Graven retained the right to vote the shares of stock for his entire life, and that the Trustee of the Trust, Bobby F. Graven, testified in effect that he did what his father told him. Upon reviewing the record, the Court finds that the Bankruptcy Court's determination that the transfers of property were made with the intent to hinder, delay or defraud creditors in violation of the U.S. Bankruptcy Code and Missouri state law is not clearly erroneous. Further, the Court notes the Bankruptcy Court's determination of fraud in connection with the case is based in part upon the debtors'

representations in their Schedules that there had been no transfers of property and no leases within one year prior to the filing of their bankruptcy petition. These representations were obviously untrue and the debtors filed to offer any convincing explanation for these representations. Also, it should be noted that the debtors conveyed their mineral rights in the Oklahoma property after they filed their bankruptcy petition. This Court has conducted its own independent determination of the accuracy of the Bankruptcy Court's ultimate conclusion that the debtors committed fraud in connection with the case and concludes that the Bankruptcy Court did not err in reaching that conclusion. It should be noted that the appellants contend that the Bankruptcy Court based its opinion improperly and entirely upon the Trustee's reports. The Court finds that this argument has no merit as the record discloses that the Bankruptcy Court conducted an exhaustive hearing on the matter on April 10, 1989. At that hearing, 98 exhibits were introduced. The Bankruptcy Court's opinion was based upon the facts contained within those exhibits.

The second major issue to be resolved in this case is whether the Bankruptcy Court erred in converting the Chapter 12 proceedings to Chapter 7 after the debtors had moved to voluntarily dismiss the Chapter 12 proceedings. The issue raises apparent conflicts between subsections (b) and (d) of 11 U.S.C. § 1208 of the Bankruptcy Code which provide as follows:

> § 1208. Conversion or Dismissal
>
> * * *
>
> (b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

Appendix P

* * *

> (d) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

Both parties are in agreement that there are no reported cases on point which interpret §§ 1208(b) and (d) or attempt to resolve the apparent conflicts between those two subsections. The appellants argue that the use of the word "shall" in § 1208(b) as opposed to the use of the word "may" in § 1208(d) means that the Chapter 12 proceeding should have been immediately dismissed following the presentation of their oral motion to dismiss the proceedings on January 24, 1989. Appellants further point out that the Bankruptcy Court made no determination of fraud until May 23, 1989 and argue that "[section 1208 of the Code does not contemplate a procedure where a Chapter 12 case can be held in abeyance long enough for a finding of fraud to be made by a court." Finally, appellants contend that the interpretation of §§ 1208 adopted by the Bankruptcy Court would result in fewer protections for farmers under Chapter 12 as provisions in other chapters of the Bankruptcy Code prohibit involuntary relief of any kind against a farmer. Appellants further point out that Chapter 12 "has the clear purpose of enhancing a farmer's rights under Bankruptcy Law."

Upon reviewing the record, this Court joins with the Bankruptcy Court in refusing to interpret § 1208(b) and (d) to mandate dismissal of Chapter 12 proceedings under the circumstances presented in this case. To adopt the interpretation of § 1208 (d) useless, would lead to endless abuse of the bankruptcy process, and would clearly thwart the clear purpose of Chapter 12, which is to provide relief for the honest debtor, and the intent of

Congress in adopting § 1208(d). *See* In re Zurface, 95 B.R. 527, 539 (Bkrtcy. S.D. Ohio 1989).

Further, with respect to the appellants' argument that the use of the word "shall" in § 1208(b) always mandates immediate dismissal of a Chapter 12 proceeding, many courts have adopted the following rule of statutory interpretation:

> The word "shall" is generally construed to be mandatory in its meaning. . . . This general rule gives way however where such a rule would defeat the purpose or spirit of an act. When a literal reading of a statute would defeat the statute's purpose or where extreme hardship would result from such a reading, the language may be read in such a manner as to be harmonious with the purpose of the statute. In re Stewart, 14 B.R. 959, 960 (Bkrtcy. N.D. Ohio 1981).

The Court believes that the purpose of Chapter 12 is preserved by an interpretation of § 1208(b) and (d) which permits a Bankruptcy Court to convert a Chapter 12 proceeding to one under Chapter 7 upon a finding of fraud in connection with the case despite the debtor's motion to dismiss.

Further, the Court is of the opinion that several cases resolving a conflict between 11 U.S.C. § 1307(b) and (c), which are substantially similar to § 1208(b) and (d), are supportive of the court's interpretation of the latter subsections. *See* In re Viewing, 80 B.R. 383 (Bkrtcy. E.D. Mich. 1987); In re Tatsis, 72 B.R. 908 (Bkrtcy. W.D. N.C. 1987); In re Jacobs, 43 B.R. 971 (Bkrtcy. E.D.N.Y. 1984); In re Powers, 48 B.R. 120 (Bkrtcy. M.D. La. 1985); and In re Gaudet, 61 B.R. 349 (Bkrtcy. D.R.I. 1986). These cases stand for the proposition that in appropriate situations, a Chapter 13 debtor may be involuntarily converted to a Chapter 7 proceeding, despite the debtor's motion to dismiss. By enacting §

1208(d), Congress specifically permits the conversion of a farmer's case to Chapter 7.

The debtors argue, however, that their motion to dismiss preceded the Court's finding of fraud in connection with the case. As a result, debtors argue the motion to dismiss should have been immediately granted. In this case, the debtors moved to dismiss the proceedings at the beginning of a hearing to consider the Trustee's Reports, which indicated that the debtors had transferred substantial amounts of property in fraud of their creditors. Debtors obviously filed their motion to dismiss in an attempt to avoid adverse actions by the Bankruptcy Court. The Court does not construe § 1208(b) as requiring that a Bankruptcy Court must act immediately to grant a debtor's motion to dismiss pursuant to that subsection – particularly when it is obvious that debtors are seeking to avoid an imminent finding of fraud by the Bankruptcy Court. This view is supported by the Court's action in In re Tyndall, 97 B.R. 266 (Bkrtcy. E.D.N.C. 1989).

This Court holds that in view of the Bankruptcy Court's conclusion that debtors committed fraud in connection with the case, § 1208(b) and (d) should be interpreted to allow the Bankruptcy Court to convert the debtor's Chapter 12 proceeding to Chapter 7 despite the debtor's motion to dismiss if such action is in the best interests of the bankruptcy estate. As such action is clearly in the best interests of the estate in this case, it is hereby

ORDERED that the order of the Bankruptcy Court dated May 22, 1989 is affirmed.

s/ William R. Collinson
United States Senior District Judge

March 29, 1990

APPENDIX Q — OPINION OF THE UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION FILED MAY 23, 1989

No. 87-04885-S-2-11

IN RE:
BOBBY NOAH GRAVEN and
MILLIE ANN GRAVEN,

Debtors

Memorandum Opinion

Appendix Q

Debtors filed for relief under Chapter 12 on November 12, 1987. Their plan was duly filed and a confirmation hearing scheduled for March 2, 1988. Also scheduled were objections thereto. On March 2, 1988, a Motion for Investigation by the Chapter 12 Trustee was filed. The Court announced from the Bench at the conclusion of the hearing that it would order an investigation and did so in its Memorandum Opinion of March 23, 1988. The Trustee conducted an extensive and exhaustive investigation, filed reports, and a hearing was set on January 24, 1989. At the start of that hearing, debtors filed a Motion For Dismissal and the assembled creditors, as well as the Trustee, objected orally, subsequently filing assorted motions to dismiss with sanctions, and/or to convert. Hearing was scheduled thereon on April 10, 1989, parties heard, and the matter is now submitted.

The Court believes that there are two issues:

1. Does the Chapter 12 Trustee's investigation establish fraud on the part of the debtors?

2. If so, is a debtor's right to dismiss at any time under 11 U.S.C. § 1208(b) subject to the court's ability to convert to Chapter 7 under 11 U.S.C. § 1208(d), or must the court dismiss no matter what the circumstances?

Since the second issue cannot come into play unless fraud is found, these two items will be discussed in that order.

FRAUD

On or about January 16, 1985, debtor Bobby N. Graven incorporated a Missouri corporation, titled Graven Auction Company, Inc. He was the sole incorporator, the president and one of two directors of the new entity. He held all the issued stock. The other director was Joanne Lashua who was also the secretary of the corporation. She was an employee of Bobby N. Graven. She resigned post petition and her whereabouts are unknown. On or

about January 16, 1985, Bobby N. Graven conveyed eight tracts of real estate to the corporation. All of the conveyances were by warranty deed executed by Bobby N. Graven. Approximately one year later (January of 1986), debtor Millie A. Graven executed her warranty deeds on the same properties to the coporation.[1] There was no monetary consideration paid by the corporation to either of the debtors. A schedule is attached hereto shoving the item of realty, the purported value, the date of each deed, the notary public involved and the date the deed was recorded.

On January 1. 1986, Bobby N. Graven and Millie A. Graven executed a bill of sale to Graven Auction Company, Inc. covering 169 head of Holstein and Brown Swiss dairy cattle, 5 motor vehicles, 4 tractors, and all the equipment that comprised their dairy operation. They subsequently leased all of said property back from Graven Auction Company, Inc. and at all times between January 1, 1986, and March of 1988, when they sought confirmation, were in full control and possession of all of said personalty.[2] No consideration was paid for the bil of sale. Debtors have never set a value on said property. Debtors now maintain the lease was terminated in November of 1988 and refuse to answer questions about Graven Auction Company, Inc., or what happened to said personal property.

In addition to these specific items, it appears that debtors

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[1] Mo. R.S. 474.150(2) deems any conveyance of real estate by a married person to be in fraud of the marital rights of a surviving spouse.

[2] Bringing into play Mo.R.S. 428.080, which wouldstrongly suggest that the purported transfer and alleged leaseback was void as to creditors of debtors and that same was still property of the estate.

were owners of a substantial number of promissory notes, deeds of trust, and accounts receivable, which, although not easily traceable, were assigned to Graven Auction Company. Also there is the so called "Manes Farm" which was transferred to the corporation and then back to debtors just prior to bankruptcy.

On January 1, 1986, debtor Bobby N. Graven transferred all of the outstanding shares of the common capital stock of Graven Auction Company to Bobby F. Graven, Trustee for the Bobby N. Graven Irrevocable Trust. The stated consideration was $1.00 and natural love and affection. At the same time 282 shares of the common capital stock of Graven Realty, Inc., another corporation controlled by debtor Bobby N. Graven, was transferred to the same trustee for the same trust for the same identical consideration, or absence thereof. It would appear that this is all the stock of said corporation except for 18 shares. The stated beneficiaries of the irrevocable trust are: Bobby F. Grave, Daniell N. Graven and Gayle A. Graven. The beneficiaries of the irrevocable trust are the children of Bobby N. Graven and Millie A. Graven. Bobby N. Graven retained the power to vote the stock in the two corporations during his life.

Bobby F. Graven, the stated trustee, testified that he had received no money, managed no assets, done nothing in regard to the two corporations or as to the assets the two corporations purportedly owned. He further testified that his father, debtor Bobby N. Graven, took care of all that. This was at the hearing in March of 1988, some two years after the transfers to the trust.

The evidence at the first hearing showed that in January of 1985, Pillsbury Company had obtained a substantial judgment against debtor Bobby N. Graven, and that debtors had substantial debts in 1985.

Moving next to the schedules and statement of affairs filed

by debtors, the following items are of interest. Item 4 from Statement of Debtor-In-Possession, File Document #8, "There are no leases by Debtor." This is signed by both debtors and is patently false if they were leasing the dairy herd and equipment. Likewise in Item 17 of the Statement of Affairs, debtors list a $70.00 per month rental to Graven Realty, Inc., but do not list the lease of 169 head of dairy cattle, the motor vehicles, the tractors and all the dairy equipment. In the first operating report filed December 10, 1987, Document #10, under Cash Received the debtors show $1,675.70 received from 3 cows sold 11/11/87. This was after the alleged transfer and leaseback of all the milk cows, and yet debtors received these funds. Debtors transferred the Oklahoma property (or at least the mineral rights thereto) after filing.

There are other matters, as set out in the reports of investigation of the Chapter 12 Trustee, such as the alleged termination of the lease on the personalty without court approval, the alleged return of all said property to the Trust (or its corporation), the refusal to answer any questions about the corporate affairs, etc., but they merely fill in the background of an already clear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtors. Further as shown by the report of the Trustee, although the transfers were purported to take place in 1985 and 1986, the recording dates establish that certain of said transfers were not completed until February 1987, well within one year of the filing of the petition.

DISMISSAL VERSUS CONVERSION

Since the Court has found that debtors did commit fraud, it must consider the second issue framed above, i.e., must the Court dismiss or may it convert? Debtors want to dismiss. Creditors want to convert. 11 U.S.C. § 1208(b) and (d) contain the two provisions which are opposite and apparently opposite as regards the divergent

desires of the parties. As per Lexis and Westlaw, there are no reported cases interpreting which is controlling under Chapter 12, except one recent case from North Carolina. However, there are some interesting parallels found under 11 U.S.C. § 1307(b) and (c). Section 1208(b) and § 1307(b) are identical except for the inclusion of the reference to § 1208 in the latter. Section 1208(d) and § 1307(c) are not identical but at least in the pertinent parts are extremely close. In both § 1208 and §1307, the debtor's right of dismissal is mandated by the direction to the court that it "shall dismiss" while the right of a party in interest to effect a conversion is couched in the permissive power of the court, i.e., the court "may convert." It is upon this semantic difference that debtors first rely in their contentions. They now seek to fold their tent and silently steal away, perhaps leaving behind all but a few of the larger and more vigilant creditors who may choose to follow the contorted and twisted path of transfers without consideration first to a shell corporation and then to a family trust.

The Court declines to agree with this approach. The first reason is philosophical. Bankruptcy laws have always had as their intent the protection and/or rehabilitation of honest debtors. They are not and have not been intended to shield those parties who have attempted to hinder, delay or defraud their creditors. Second, although this Court recognizes and appreciates the grammatical difference between "shall" and "may," other courts have stated:

> Words imparting permission may be read as mandatory and words imparting command may be read as permissive when such construction is made necessary by evident intention or by the rights of the public. Sutherland Statutory Construction, Sards 4th Edition, Volume 3A, pg. 209.

See Jennings v. Suggs, 180 Ga. 141, 178 S.E. 282 (1935), Ewing

v. Union Central Bank, 254 Ky. 623, 72 S.W.2d 4 (1934). if such an interpretation is permissible, then this is a case where it is appropriate. Debtors listed eleven unsecured creditors, six of whom have claims ranging from $622.00 to $3,645.27. These parties can hardly afford to pursue their rights in any forum other than the bankruptcy proceedings. In bankruptcy the Trustee can pursue the assets of the estate for the benefit of all the creditors – large and small – secured and priority – alike.

Third, at least one other bankruptcy court has recognized that the apparent mandate of 11 U.S.C. § 1208(b) may be tempered at least by delay. In the very recent case of In re Tyndall, 97 B.R. 266 (Bkrtcy. E.D. N.C. 1989), Bankruptcy Judge A. Thomas Small refused the dismissal requested by the Chapter 12 debtors until after the Chapter 12 Trustee had liquidated the collateral securing the debt to FmHA. Judge Small reasons that 11 U.S.C. § 1307(b) does not mandate any time frame within which it must be ruled by the Court and that the Court may rule upon other motions by other parties while the debtor's motion for dismissal is pending. Judge Small rules that the same interpretation should be applied to § 1208(b) and cites 3 Norton Bankruptcy Law and Practice, Section 83.09 (1987).

This Court agrees with Judge Small and also with Bankruptcy Judge Ray Reynolds Graves in In re Vieweg, 80 B.R. 838. In that case, Judge Graves held that the court could convert a pending Chapter 13 case under § 1307(c) to a Chapter 7 case over the objection of a debtor who had filed a motion to dismiss under § 1307(b). Judge Graves preferred an analysis of § 1307(b) and (c) that afforded reasonable meaning to both sections. To quote Judge Graves:

> "To say Congress intended that a debtor could thwart a creditor's opportunity even to present his proofs by filing

> a motion to dismiss, thus relegating the creditor to pursuit of his remedies in yet another forum, a state court, defies reason." (Vieweg, id., (l.c. 841).

In the same vein, see In re Tatsis, 72 B.R. 908 (Bkrtcy. W.D. N.C. 1987) wherein Bankruptcy Judge Marvin R. Wooten converted a Chapter 13 proceeding to a Chapter 7 even though debtors had filed a motion to dismiss under § 1307(b). Of course, in the Tatsis case, the debtors withdrew said motion to dismiss, but the principles discussed in said case are pertinent. Nor has the Court ignored the cases that have held to the contrary, i.e., that a § 1307(b) motion by a debtor to dismiss is automatic and overrides other considerations; e.g. In re Looney, 90 B.R. 217 (Bkrtcy. W.D. Va. 1988) and earlier cases cited therein. Contrary to what Chief Bankruptcy Judge Pearson opines in that case, this Court believes that there is a common purpose behind subsections (b) and (c) of §1307. The purpose is to distinguish between the case of the "honest debtor" who for whatever reason chooses to dismiss and is permitted to do so and the debtor who has sought to use the bankruptcy court as a subterfuge rather than a refuge. It is only where there has been a showing of sever impropriety on the part of the debtor that § 1307(c) should or could be invoked.

Finally, there is precedent in the Western District of Missouri for holding that fraud vitiates a voluntary dismissal of a Chapter 13 proceeding. In the case of Wesley Medical Center v. Wallace. 57 B.R. 364 (W.D. Mo. 1985), the Honorable Scott O. Wright, Chief Judge, vacated a dismissal granted in Chapter 13 upon the motion of the debtor where fraud had occurred. This Court believes that if fraud can invalidate an order of dismissal under § 1307(b), fraud can allow a court to convert a Chapter 12 to a Chapter 7 when the public good requires it.

This Court has never, in its brief three plus years on the

bench, heretofore refused any motion to dismiss on the part of a debtor under § 1307(b) or § 1208(b). This Court has never, in that same brief tenure, seen conduct of the kind exposed in this case on the part of a Chapter 13 or Chapter 12 debtor. The Court has been unable to discover any other reported case construing either the Chapter 13 issue of the Chapter 12 issue in the Western District of Missouri. The Court freely admits that the view it adopts follows the minority view. But somewhere there must be a starting point in determining how the law in regard to Chapter 12 will evolve. For whatever value then, in the ultimate decision as to the law in this district, this Court shall opt to afford the honest Chapter 12 debtor the unfettered right to dismiss at any time, but shall not reward a debtor it believes has chosen to abuse the legal process and the bankruptcy process by both prepetition and postpetition misconduct and fraud.

The Motion to Convert the proceedings to Chapter 7 is GRANTED. The Motion to Dismiss becomes moot as a result thereof. The United States Trustee is directed to appoint a Trustee.

SO ORDERED this 23rd day of May, 1989.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required under Rule 7052, Rules of Bankruptcy.

s/ Frank W. Koger
Bankruptcy Judge

Appendix Q

ITEM	ESTIMATED VALUE	PARTY CONVEYING AND DATE	NOTARY PUBLIC	DATE OF RECORDING	GRANTEE
House & 7 acres	$125,000.00	BNG–1–16–85	Lloyd Hanna	2–1–85	Graven Auction Co.
Seymour, MO		MAG–1–1–86	Joanne Lashua	2–18–87	
House & 2 acres	$ 49,000.00	BNG–1–16–85	Lloyd Hanna	2–1–85	Graven Auction Co.
Seymour, MO		MAG–1–1–86	Joanne Lashua	2–18–87	
House in	$ 25,000.00	BNG–1–16–85	Joanne Lashua	2–4–85	Graven Auction Co.
Mt. Grove		MAG–1–1–86	Joanne Lashua	2–18–86	
2 Office Bldgs	$ 72,000.00	BNG–1–16–85	Joanne Lashua	2–4–85	Graven Auction Co.
Mansfield, MO		MAG–1–16–86	Joanne Lashua	2–18–86	
House in	$ 35,000.00	BNG–1–16–85	Joanne Lashua	2–4–85	Graven Auction Co.
Mt. Grove		MAG–1–1–86	Joanne Lashua	2–18–86	
251 Acres	$ 50,000.00	BNG–1–16–85	Joanne Lashua	2–6–85	Graven Auction Co.
Mt. Grove		MAG–1–1–86	Joanne Lashua	2–18–87	
110 Acres	$ 60,000.00	BNG–11–15–86	Joanne Lashua	2–18–87	Graven Auction Co.
Cabool, MO		MAG–11–15–86	Joanne Lashua	2–18–87	
40 Acres	$ 60,000.00	BNG–11–10–86	Joanne Lashua	11–10–86	Graven Auction Co.
Oklahoma		BNG–11–17–87	Joanne Lashua	11–20–87	

APPENDIX R — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 20, 1992

UNTIED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Case No. 87-04885-S-2

In re BOOBY NOAH GRAVEN, and
MILLIE ANN GRAVEN,

Debtors,

RICHARD V. FINK, Trustee,

Plaintiff

vs.

BOBBY NOAH GRAVEN, ET AL.

Defendants

Memorandum Opinion

Appendix R

This case comes before the Court on Trustee's motion for summary judgment on Counts I, II, III and IX of his Second Amended Complaint. Trustee seeks to avoid certain transfers of real and personal property as fraudulent conveyances and seeks to deny Debtors their discharge under § 727.

Trustee's motion is based on this Court's order of May 22, 1989, issued in the Gravens' main case. In re Graven, 101 B.R. 109 (Bankr. W.D. Mo. 1989). That order denied Gravens' motion to dismiss their Chapter 12 case and ordered the case converted to chapter 7 due to fraud on Debtors' part. Id. at 111. Trustee seeks to use the doctrine of collateral estoppel and the finding of fraud in that action to preclude telitigation of the fraud element in his claims that are based on Missouri's fraudulent conveyance statute, Mo. Rev. Stat. § 428.020 (1986)[3] as well §§ 548(a) (1)[4] and 727(a)

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[3] Missouri's fraudulent conveyance statute reads:

428.020 Conveyances to defraud creditors, void. --

Every conveyance . . . of any estate or interest in lands, or in goods and chattels . . . made or contrived with the intent to hinder, delay or defraud creditors . . . shall be . . . clearly and utterly void.

Mo. Rev. Stat. § 428.020 (1986) (emphasis added).

[4] § 548(a) reads:

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . .

11 U.S.C. § 548(a) (1988) (emphasis added).

(2)[5] of the Bankruptcy Code.

DISCUSSION

The elements fo collateral estoppel which are recognized by the 8th Circuit were recently stated in Johnson v. Miera (In re Miera), 926 F.2d 741 (8th Cir. 1991), to be:

> (1) the issue sought to be precluded must be the same as that involved in the prior action;
>
> (2) the issue must have been litigated in the prior action;
>
> (3) the issue must have been determined by a valid and final judgment; and
>
> (4) the determination must have been essential to the prior judgment.

Miera, at 743. In addition, when a litigant seeks to apply collateral estoppel against one who was not a named party in the previous case, there must be privity between the party against whom the estoppel is asserted and the named party who had the issue decided against them in the previous lawsuit. 1B, James Wm. Moore, Moore's Federal Practice ¶ 0.44[3–1] (2d ed. 1991). At minimun,

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[5] § 727 (a) reads in pertinent part:

(a) The court shall grant the debtor a discharge, unless—

> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> . . .

11 U.S.C. § 727 (a) (2) (1988) (empahsis added).

the identity of interest between the party to the previous suit and the party to be estopped must be such that the party to be estopped had a full and fair opportunity to litigate the issue in the previous litigation.

The specific subsection at issue in the previous case was § 1208(d). That Subsection reads:

> On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

11 U.S.C. § 1208(d) (1988) (emphasis not in original). The finding that was necessary to that case was that Debtor had committed fraud in connection with the case. But the element in common to Mo. Rev. Stat. § 428.020 and §§ 548 and 727 of the Code, and to which Trustee seeks to apply the doctrine of collateral estoppel, is that of intent to hinder, delay, or defraud creditors. The fraud element necessary to the judgment in the previous action is simply not the same as the intent to hinder, delay, or defraud creditors which is required in the instant action. This is so even though the evidence presented in the previous case will greatly overlap with that necessary in the instant case. The general proposition that there was fraud in connection with the case does not necessarily imply the more specific intent to hinder, delay, or defraud creditors.

In its previous opinion, this Court stated that the actions of Debtor constituted a "c.ear pattern of deliberate fraud perpetrated with the intent to hinder, delay and defraud the creditors of the debtores." Graven, 101 B.R. at 111. Even though it appears that the Court specifically found the identical element required under the statutes at issue in this action, such finding was not necessary to the outcome of that case. It would be fundamentally unfair to

summon a party into court with notice that the issue to be litigated was whether Defendant had committed fraud in connection with the case and then to use the findings in that proceeding to satisfy the element of intent to hinder, delay, or defraud creditors in a subsequent case. Before the doctrine fo collateral estoppel may properly be applied, Defendant must have had, in the prior case, a fair and full opportunity to litigate the same issue under present consideration. Defendants simply had nosuch opportunity because the issue litigated previously was a broader issue and did not necessarily include the more narrow issue currently being considered.

Moreover, even if the above stated elements of collateral estoppel were fully met, the Court could not apply the doctrine to Counts I and III in this case. Those counts are fraudulent conveyance actions. Count I is brought under the Missouri fraudulent eonveyance law, Mo. Rev. Stat. § 428.020 (1986), and Count III is brought under § 548 of the Code. In both actions, Trustee asks this Court to declare the transfers at issue to be void. The use of collateral estoppel is inappropriate where there is danger "of the potential adverse impact of the determination on . . . the interests of persons not themselves parties in the initial action." Restatement (Second) of Judgments § 28(5) (1982). Of all the defendants in this action, Debtors were the only ones before the court in the § 1208 action. A finding that the transfers in question are void as to Debtors would necessarily have an adverse effect on the title to the property of the parties to whom the transfers were made. But those entities were not before the Court in the previous litigation, so application of collateral estoppel to Defendants would adversely impact entities who have not had a full and fair opportunity to litigate the issue of the validity of the transfers in question.

Appendix R

The Court may grant Trustee's motion for summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The moving party is entitled to a judgment as a matter of law." The Trustee cannot use the doctrine of collateral estoppel to satisfy the element of intent to hinder, delay, or defraud creditors. The element of intent is a factual issue, therefore, there exists a factual dispute as to that element in Counts I, III, and IX which are based on Mo. Rev. Stat. 428.020, and §§ 548 (a) (1) and 727 (a) (2) of the Bankruptcy Code.

As to Count II, that count requests turnover of the subject property under § 542 (a). The effect of § 542 (a) is to compel those in possession of estate property to turnover such property to the trustee. See United States v. Whiting Polls, Inc., 103 S. Ct. 2309, 2312 (1983). This count depends upon a finding in Count I that the subject property transfers were void under Mo. Rev. Stat. § 428.020. Because the Court cannot grant Trustee's motion as to Count I, there exists a factual issue as to wherher the subject property is property of the estate.

CONCLUSION

For the foregoing reasons, factual disputes exist as to Counts I, II, III, and IX, therefore, Trustee's motion for summary judgment must be DENIED.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required under Rule 7052, Rules of Bankruptcy.

SO ORDERED this 20 day of March, 1992.

s/ Frank W. Koger
Chief Bankruptcy Judge

APPENDIX S —DEBTOR'S COMPLAINT FOR INDEPENDENT ACTION FOR RELIEF FROM BANKRUPTCY PROCEEDINGS FILED WITH THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION FILED DECEMBER 18, 1995

BOBBY NOAH GRAVEN, and
BOBBY F. GRAVEN as Personal
Representative for the
ESTATE OF MILLIE ANN GRAVEN, Deceased,

Plaintiffs, Involuntary Debtors,

vs.

RICHARD V. FINK, Trustee for
Bankruptcy Estate of
BOBBY NOAH GRAVEN
and ESTATE OF MILLIE ANN GRAVEN deceased,

Defendant.

INDEPENDENT ACTION FOR RELIEF FROM THE BANKRUPTCY PROCEEDINGS, JUDGMENTS, AND ORDERS

Appendix S

COME NOW Plaintiffs, Bobby Noah Graven, and Bobby F. Graven as personal representative for the estate of Millie Ann Graven, deceased, by and through their attorney, Jianbin(Jim) Wei, and for their independent action for relief from the bankruptcy proceedings, judgments, and orders, state to the Court the following:

1. Plaintiff Bobby Noah Graven, an individual, and the estate of Millie Ann Graven, deceased, of which Plaintiff Bobby F. Graven is the personal representative, are involuntary debtors in the bankruptcy proceedings pending in this Court, case numbers 87-04885-S and Adv. No. 89-06057-s;

2. That Defendant Richard V. Fink is the bankruptcy trustee appointed by this Court for the Estate of Plaintiff Bobby Noah Graven and Plaintiff the Estate of Millie Ann Graven, deceased; and service of process can be made on Defendant's attorney Thomas J. O'Neal, at 901 St. Louis Street, Suite 1200, Springfield, Missouri, 65806;

3. That Rule 9024 of the Bankruptcy Rules provides that Rule 60 of the Federal Rules of Civil Procedure applies in cases under the Bankruptcy Code;

4. That Rule 60(b) of the Federal Rules of Civil Procedure provides that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding" and by said rule, an independent action for relief from judgment, order and proceedings is preserved, see comments following Rule 60 of Fed. Civ. R. P.;

5. That this Court has jurisdiction over the instant case by reason of section 157 of Title 28 of the United State Code, see Crosby v. Mills, 413 F. 2d 1273(10th Cir. 1969);

6. That on November 12, 1987, Plaintiffs Bobby N. Graven and Millie Ann Graven, now deceased, filed, as family farmers,

their petition for relief under Chapter 12 of Title 11 of the United States Code, case No. 87-04885-S;

7. That on or about January 24, 1989, Plaintiffs file their Application For Voluntary Dismissal of their Chapter 12 case;

8. That on or about February 10, 1989, Defendant Trustee filed his Motion To Convert Case to a Chapter 7 case;

9. That on May 22, 1989, this Court issued its memorandum opinion granting Defendant Trustee's Motion To Convert to a Chapter 7 case notwithstanding Plaintiffs' filing their Application for Voluntary Dismissal and strenuous objection to the conversion, see In re Graven, 101 B.R. 109(Bankr. W.D. Mo. 1989);

10. That the memorandum opinion was subsequently affirmed by the United States District Court for the Western District of Missouri, on March 29, 1990; and by the United States Court of Appeals for the Eight Circuit on June 25, 1991, see In re Graven, 936 F. 2d 378 (8th Cir. 1991);

11. That on June 22, 1989, Defendant Trustee filed its complaint against Plaintiffs and others in its adversary proceeding, said complaint was amended later on September 1, 1989, case number Adv. No. 89-06057-s;

12. That on November 2, 1992, and on subsequent dates, this Court entered its various judgments and orders in the above-mentioned adversary proceeding against Plaintiffs in various counts, among other things, denying plaintiffs a discharge and awarded Defendant Trustee actual damages in the amount of $122,086.45 and punitive damages in the amount of $50,000.00;

13. That the judgments entered in the adversary proceeding was subsequently affirmed by the United States District Court For the Western District and the United States Court of Appeals for the Eighth Circuit, see In re Graven, 64 F. 3d 453 (8th Cir. 1995);

14. That all the judgments and orders entered in the bankruptcy proceedings (case numbers 87–04885 and Adv. No. 89–06057) since the filing of Plaintiffs' Application For Voluntary Dismissal were void or in error because the courts were without jurisdiction in that Plaintiffs' Chapter 12 case was converted to chapter 7 case in violation of sections 303(a) and 1208(e) of Title 11 of the United States Code which sections prohibited an involuntary chapter 7 case against family farmers and the involuntary conversion of Plaintiffs' Chapter 12 case to Chapter 7 case was such a prohibited Chapter 7 case against family farmers, said sections provides respectively:

Section 303(2) of Title 11:

An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except, a farmer, a family farmer, or a corporation that is not a moneyed, Business, or commercial corporation, that may be debtor under the chapter under which such case is commenced.

Section 1208(e):

Notwithstanding any other provision of this section [including section 1208(d) on fraud], a case can not be converted to a case under another chapter unless the debtor may be a debtor under such chapter.

15. That section 1208(e) makes it crystal clear that notwithstanding any findings of fraud under section 1208(d), a court can not convert c chapter 12 case to a case under chapter 7 if the debtor may not be a debtor under such chapter;

16. That by reason of section 303(a), a family farmer may not be a debtor under chapter 7 if he opposes a Chapter 7 case against him;

17. That in rendering and affirming the judgments, this

Court and the appellate courts were unaware of the existence of and/or failed to consider sections 303(a) and 1208(e) of Title 11 of the United States Code, such having been demonstrated by the courts' failure to cite or even mention said statutory sections in all the opinions they have rendered thus far in the bankruptcy proceedings while such statutes had a direct bearing on the conversion issue then before the courts;

18. That by reason of section 103 of Title 11 of the United States Code, which provides that "[e]xcept as provided in section 1161 of this title, chapter 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title," section 303(a) applies and should have been considered whether to grant Plaintiffs' Application For Voluntary Dismissal or Defendant Trustee's Motion To Convert Case;

19. Plaintiffs' Application For Voluntary Dismissal filed on January 24, 1989, should have been granted under section 1208(b) of Title 11 of the United State Code;

20. That Defendant's Motion To Convert Case to Chapter 7 on February 10, 1989, should have been overruled rather than having been granted because said motion did violence to the clear meaning of sections 303(a) and 1208(e) of Title 11 of the United States Code;

21. That had Plaintiffs' Application for Voluntary Dismissal been granted, Defendant Trustee, or for that matter, any creditor would not have been able to force Plaintiffs into a Chapter 7 case by reason of section 303(a) of Title 11 of the United States Code;

22. That creditors should not have been allowed to have an involuntary Chapter 7 case against Debtors which they would not otherwise have been able to do by reason of said section 303(a);

23. That the involuntary conversion of Plaintiff's Chapter 12 case to Chapter 7 notwithstanding Plaintiffs' Application for

Voluntary Dismissal and strenuous objection and the continued prosecution of Chapter 7 proceedings against the will of Plaintiffs are unjust and are in violation of the federal statutes sections 303(a) and 1208(e) of Title 11 of United States Code;

24. That the court's failure to consider sections 303(a) and 1208(e) of Title 11 of the United States Code while said statutes had direct bearing on the issue constituted such unusual and exceptional circumstances warranting equitable relief to Plaintiffs from the Chapter 7 bankruptcy proceedings, judgments, and orders.

25. That this is the time to consider implications of the overlooked federal statutes on the Chapter 7 cases against Plaintiffs because the liquidation of Plaintiffs' assets has not started and irreparable harm to Plaintiffs, which would be caused by a liquidation, could be avoided if this Court, upon careful consideration of the issue anew in light of the overlooked federal statutes, concludes that an error of law has been committed, as so firmly believed by Plaintiffs;

26. That in filing this independent action, Debtors are not merely interested in stalling or delaying the Chapter 7 proceedings, but they do firmly believe, based on the federal statutes which this court and the appellate courts have overlooked, that the Chapter 7 bankruptcy proceedings have been instituted and maintained against them illegally and in violation of federal statutes, and Plaintiffs do hereby request for a quick resolution of this independent action.

WHEREFORE Plaintiffs pray that the Court enter its judgment against Defendant Trustee

(1) relieving Plaintiffs from all prior orders, judgments rendered in cases 87–04885–S and Adv. No. 89–06057–S after the filing of Plaintiffs' Application For Voluntary Dismissal and from the current Chapter 7 bankruptcy proceedings by dismissing the Chapter 7 case against

plaintiffs;

(2) ordering Defendant Trustee to return all of Plaintiffs' property now in the possession of Defendant Trusteed to Plaintiff;

(3) denying all fees for Defendant Trustee and for his attorneys incurred after January 24, 1989 when Plaintiffs' Application For Voluntary Dismissal should have been granted under section 1208(b) of Title 11 of the United States Code, and ordering a refund of the same, if already paid;

(4) awarding Plaintiff attorneys' fees incurred after January 24, 1989 when Plaintiffs' Application For Voluntary Dismissal should have been granted under section of 1208(b) of Title 11 of the United States Code; and

(5) granting such other relief as the Court deems just and proper under the premises including damages Defendant Trustee has caused Plaintiffs by the continued prosecution of the chapter 7 proceedings against Plaintiffs.

BOBBY NOAH GRAVEN, and
BOBBY F. GRAVEN, as Personal
Representative for the
ESTATE OF MILLIE ANN GRAVEN,
DECEASED
Plaintiffs, Involuntary Debtors

By: _____

Jianbin (Jim) Wei
Mo. Bar No. 45593
302 S. National Avenue
Springfield, MO 65802
(417) 865-8335

APPENDIX T — TRUSTEE'S COMPLAINT AGAINST PETITIONERS IN ADVERSARY PROCEEDING FILED WITH THE UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION FILED SEPTEMBER 1, 1989

Case No. 87-04885-S-7-FWK
Adversary No. 89-6057-S-2

BOBBY NOAH GRAVEN, and
BOBBY F. GRAVEN,

Debtors.

RICHARD V. FINK, TRUSTEE,

Plaintiff,

vs.

BOBBY NOAH GRAVEN,
MILLIE ANN GRAVEN,
GRAVEN AUCTION COMPANY, INC.,
BOBBY F. GRAVEN as Trustee
under Bobby N. Graven Trust,
WILL FLETCHER, GRAVEN REALTY, INC., and
GREAT MIDWEST INVESTMENTS, INC.,

Defendants.

Second Amended Complaint

Appendix T

Count I

COMES NOW Richard V. Fink, Trustee of the above estate, for his cause of action on Count I of his Second Amended Complaint against the defendants, Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, Graven Realty, Inc., and Great Midwest Investments, Inc., and alleges and avers as follows:

1. Plaintiff is the duly appointed Trustee of the bankruptcy estates of Bobby Noah Graven and Millie An Graven, defendants.

2. Defendants Bobby Noah Graven and Millie Ann Graven, hereinafter referred to as "defendants Graven", are debtors in the above bankruptcy proceeding under Chapter 7 of the U.S. Bankruptcy Code.

3. Defendant Graven Auction Company, Inc., hereinafter referred to as "graven Auction", is and at all times relevant hereto was, a Missouri corporation, incorporated on January 16, 1985, by the Secretary of State of Missouri's issuance of a Certificate of Incorporation on that date. The registered agent for service of process on Graven Auction is Bobby N. Graven of Springfield, Greene County, Missouri.

4. Defendant Graven Realty, Inc., hereinafter referred to as "graven Realty", is and at all times relevant hereto was a Missouri corporation incorporated on February 13, 1975. The registered agent for service of process on Graven Realty is Bobby N. Graven of Springfield, Greene County, Missouri.

5. Defendant Bobby F. Graven is the named Trustee under a certain document entitled "Irrevocable Trust" purportedly signed on January 1, 1986, by defendant Bobby N. Graven. Defendant Bobby F. Graven is a resident of Springfield, Greene County, Missouri.

6. Defendant Will Fletcher is a resident of Springfield,

Greene County, Missouri.

7. Defendant Great Midwest Investments, Inc., hereinafter referred to as "great Midwest" is and at all times relevant hereto was a Missouri corporation, incorporated on January 23, 1989, by Will Fletcher of Springfield, Missouri, with its registered agent listed as Will Fletcher of Springfield, Greene County, Missouri.

8. This adversary proceeding arises out of and relates to the Chapter 7 bankruptcy case of defendants Graven pending before this Court under case no. 87-048850S-7-FWK and the Chapter 12 bankruptcy case of defendants Graven previously before this Court under case no. 87-04885-S-12-FWK. This Court has jurisdiction over parties and subject matter hereof pursuant to 28 U.S.C. §1334, 28 U.S.C. §157, 11 U.S.C. §§542, 543, 544, 548, 549, and 727, the doctrine of pendent jurisdiction as set forth in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), and by virtue of the inherent jurisdiction of this Court to hear and determine matters integral to the administration and distribution of the bankruptcy estates.

9. From and after January 16, 1985, defendants Graven executed various conveyances, conveying certain real estate, or interest in real estate that they owned , to Graven Auction. The following conveyances have been executed by defendants Graven and filed of record in various recorder's offices since that date:

(a) Defendant Bobby N. Graven executed a warranty deed purportedly on January 16, 1985, and filed of record of February 1, 1985, in book 342 at page 194 in the office of Recorder of Deeds of Webster County, Missouri, a true copy of which is attached hereto as Exhibit 1.

(b) Defendant Millie A. Graven executed a quit claim deed purportedly dated January 1, 1986, and filed of

record in Book 356 at page 213 in the office of Recorder of Deeds for Webster County, Missouri, on February 18, 1987, a true copy of which is attached hereto as Exhibit 2.

(c) Defendant Bobby N. Graven executed a warranty deed concerning certain property located in Wright County, Missouri, purportedly on January 16, 1985, and recorded in Book 191 at page 65 in the office of Recorder of Deeds for Wright County, Missouri, on February 4, 1985, a true copy of said deed being attached hereto as Exhibit 3.

(d) Defendant Millie A. Graven executed a warranty deed concerning property in Wright County, Missouri, purportedly on January 1, 1986, and filed of record in Book 196 at page 703 in the office of Recorder of Deeds for Wright County, Missouri, on February 18, 1986, a true copy of said deed being attached hereto as Exhibit 4.

(e) Defendant Bobby N. Graven executed a warranty deed conveying certain properties in Douglas County, Missouri, purportedly on January 16, 1985, and filed of record in Book 226 at page 471 in the Douglas County Recorder's office on February 6, 1985, a true copy of said deed being attached hereto as Exhibit 5.

(f) Defendant Millie A. Graven executed a quit claim deed concerning certain property in Douglas County, Missouri, purportedly on January 1, 1986, and filed of record on February 18, 1987, in Book 237 at page 56 in the office of Recorder of Deeds for Douglas County, Missouri, a true copy of said deed being attached hereto as Exhibit 6.

(g) At the instance and request of defendants

Graven particularly defendant Bobby N. Graven, Harold Mead and Shirley Mead executed a quit claim deed purportedly on November 30, 1985, conveying certain real estate located in Texas County, Missouri, said deed being placed of record in Book 443 at page 786 in the office of Recorder of Deeds for Texas County, Missouri, on December 9, 1985, a true copy of said deed being attached hereto as Exhibit 7.

(h) Defendants Graven executed a quit claim deed concerning property located in Texas County, Missouri, purportedly on November 15, 1986, and filed of record in Book 449 at page 840 in the office of Recorder of Deeds for Texas County, Missouri, on November 19, 1986, a true copy of said deed being attached hereto as Exhibit 8.

(i) Defendant Bobby N. Graven executed a quit claim deed concerning property in LaFlore County, Oklahoma, purportedly on November 17, 1987, and filed of record in Book 914 at page 495 in the office of the County Clerk of LaFlore County, Oklahoma, on November 10, 1987, a true copy of said deed being attached hereto as Exhibit 9.

(j) Defendant Bobby N. Graven executed a quit claim deed, purportedly on November 17, 1987, concerning certain property in LaFlore County, Oklahoma, and filed of record in Book 915 at page 423 in the office of the County Clerk of LaFlore County, Oklahoma, on November 20, 1987, a true copy of said deed being attached hereto as Exhibit 10.

(k) Defendant Bobby N. Graven executed a quit claim deed concerning certain property in Laclede County, Missouri, purportedly on January 16, 1985, said deed being

filed in the office of Recorder of Deeds for Laclede County, Missouri, in Book 187 at page 6694, on February 8, 1985, a true copy of said deed being attached hereto as Exhibit 11.

(l) From and after January 16, 1985, defendants Graven executed conveyances conveying certain real estate commonly referred to as 503 Carleton, Mountain Grove, Missouri, to Graven Auction. Thereafter, Graven Auction conveyed and sold said property to Lee Davenport and Thelma Davenport, receiving as part of the consideration of said sale a promissory note, the repayment of which was secured by a deed of trust on the property conveyed to the Davenports. Thereafter, the Davenports defaulted in performance of the terms of their promissory note and Graven Auction foreclosed by foreclosure sale held on April 5, 1989. Graven Auction was the highest bidder at said foreclosure sale and again received title to said property by a "Substitute-Trustee's Deed Under Sale", a true copy of which is attached hereto as Exhibit 11A and incorporated herein by reference.

10. Other tracts of real estate were transferred by defendants Graven to defendant Graven Auction from and after January 16, 1985, and defendant Graven Auction has subsequently sold or converted said tracts of real estate and taken as consideration for its sale therefor certain promissory notes, deeds of trust, contracts for deed, and other evidences of debt. The aforesaid promissory notes, deeds of trust, and contracts for deed are proceeds from the real estate transferred to defendant Graven Auction by defendants Graven and are generally described as follows:

(a) Bradley note and deed to trust in the

approximate amount of $22,500. This note and deed of trust resulted from the Auctions Company's sale of a certain house and lot in Seymour, Missouri, after defendants Graven transferred the property to defendant Graven Auction.

(b) Bennett note of contract in the approximate amount of $20,000 resulting from the sale by defendant Graven Auction of a mobile home and three acres located near Fordland, Missouri.

(c) George Morgan note and deed of trust in the approximate amount of $35,000 resulting from defendant Auction Company's selling property located at 919, Mountain Grove, Missouri.

(d) John Wilson contract for deed in the amount of $49,000 concerning a house and two acres in Seymour, Missouri.

11. From and after January 16, 1985, various promissory notes and contracts for deed have been assigned or transferred by defendants Graven to defendant Graven Auction. These promissory notes or contracts for deed consist of the following:

(a) Promissory note dated April 5, 1980, from Wayne Kreklow and Nancy Kreklow.

(b) Promissory note dated April 5, 1980, signed by Ellison J. Kreklow.

(c) A note or contract for deed executed by Murray Voke in the approximate amount of $65,000.

12. Debtors Graven executed a Bill of Sale, purportedly dated January 1, 1986, conveying to Graven Auction Company, Inc., all livestock, machinery, and equipment which they owned, excepting only a feeding system. A true copy of said Bill of Sale is attached hereto as Exhibit 12.

13. Defendant Bobby N. Graven executed a document entitled "Irrevocable Trust" purportedly on January 1, 1986. By said "Irrevocable Trust", a true copy of which is attached hereto as Exhibit 13, defendant Bobby N. Graven purported to convey to the named trustee, Bobby F. Graven, defendant herein, all shares of stock which defendant Bobby N. Graven owned in Graven Auction Company, Inc., and Graven Realty, Inc. Purportedly on January 1, 1986, Certificated No. 2 for 500 shares in the name of Bobby F. Graven, Trustee Bobby N. Graven Trust was issued by Graven Auction and Certificate No. 21 representing 282 shares in Graven Realty, Inc., was issued to defendant Bobby F. Graven, Trustee for Bobby N. Graven Trust.

14. In conjunction with the filing of the original complaint in this litigation, the plaintiff caused to be filed with the office of Recorder of Deeds for Texas County, Missouri, Wright County, Missouri, Webster County, Missouri, and Douglas County, Missouri, "Notice of Lis Pendens", true copies of which are attached hereto as Exhibits 15, 16, 17, and 18, respectively, and incorporated herein by reference, thereby giving notice of the claims and interest of this estate in the property therein indicated. all "notice of Lis Pendens" were filed with the respective office of Recorder of Deeds on June 26, 1989.

15. On or about July 10, 1989, defendant Graven Auction transferred various properties, more specifically described hereinafter, to Great Midwest.

(a) Defendant Graven Auction transferred to Great Midwest the real estate described in the "notice of Lis Pendens", such transfers being by deed described as follows:

(1) Warranty deed by corporation dated July 10, 1989, and filed of record in the office of

Recorder of Deeds for Wright County, Missouri, on July 14, 1989, a true copy of which is attached hereto as Exhibit 19.

(2) Warranty deed by corporation dated July 10, 1989, and filed of record in the office of Recorder of Deeds for Webster County, Missouri, on July 14, 1989, a true copy of which is attached hereto as Exhibit 20.

(3) Warranty deed by corporation dated July 10, 1989, and filed of record in the office of Recorder of Deeds for Texas County, Missouri, on July 14, 1989, a true copy of which is attached hereto as Exhibit 21.

(4) Warranty deed by corporation dated July 10, 1989, and filed of record in the office of Recorder of Deeds for Webster County, Missouri, on July 14, 1989, a true copy of which is attached hereto as Exhibit 22.

(5) Warranty deed by corporation dated July 10, 1989, and filed of record in the office of Recorder of Deeds for Webster County, Missouri, on July 14, 1989, a true copy of which is attached hereto as Exhibit 23.

(b) In addition to the real property described in paragraph 15 hereof, Graven Auction transferred to Great Midwest on or about July 10, 1989, three promissory notes, more specifically described as follows:

(1) Promissory note executed by Robert Bradley and Kathleen Bradley in favor of Graven Auction Company, Inc., in the original principal amount of $23,500.00, a true copy of which is

attached hereto as Exhibit 24.

(2) Promissory note executed by Jerry L. Bennett and Teri Bennett in favor of Graven Auction Company, Inc., in the original principal amount of $24,500.00, a true copy of which is attached hereto as Exhibit 25.

(3) Promissory note executed by George Morgan and Louise Morgan in favor of Graven Auction Company, Inc., in the original principal amount of $35,000.00, a true copy of which is attached hereto as Exhibit 26.

(c) For the transfers of property to Great Midwest as set forth herein, Graven Auction received or purports to have received a promissory note dated July 10, 1989, in the original principal amount of $245,000.00, a true copy of which is attached hereto as Exhibit 27, and the repayment of which was secured by a "mortgage of Real Estate", a true copy of which is attached hereto as Exhibit 28.

(d) The transfers of all properties by Graven Auction to Great Midwest were with notice of the interest of the claims of this estate, and any interest acquired by Great Midwest in any of the above-described properties is and was subject of the claims and interest of this estate and the plaintiff herein.

16. From and after January 16, 1985, various monies which were the proceeds of property of this estate or to which this estate is entitled were transferred to Graven Realty. Specific transfers are as follows:

(a) On or about March 17, 1989, defendants Graven and Graven Auction by quit claim deeds, true copies of which are attached hereto as Exhibits 29 and 30

and incorporated herein by reference, transferred property described in subparagraphs 9(i) and (j) to R. O. White and Wanda L. White for the sum of $45,000.00 A true copy of the cashier's check given by the Whites is attached hereto and incorporated herein as Exhibit 31. The proceeds represented by the aforesaid cashier's check were converted by placing the in an account with Edward D. Jones & Company in the name of defendant Graven Realty, Inc.

(b) In conjunction with the depositing of the aforesaid $45,000.00 cashier's check into an account the Edward D. Jones & Company, an additional cashier's check in the amount of $15,500.00 payable to defendant Bobby N. Graven was deposited into said account in the name of Graven Realty, Inc. A true copy of said cashier's check is attached hereto as Exhibit 32. Additional cashier's checks were deposited into the account of Edward D. Jones, the same being a cashier's check dated May 9, 1989, in the original amount of $9,500.00, a true copy of which is attached hereto as Exhibit 33, a cashier's check dated May 19, 1989, in the original amount of $9,500.00, a true copy of which is attached hereto as Exhibit 34, and a cashier's check also dated May 19, 1989, in the original amount of $9,800.00, a true copy of which is attached hereto as Exhibit 35. All of the aforesaid cashier's checks, Exhibits 32, 33, 34, and 35, were purchased by defendant Bobby N. Graven with the use of cash. All monies in the Edward d Jones account in the name of Graven Realty, Inc., were then paid to Graven Realty, Inc., by an additional cashier's check in the amount of $89,592.09, a true copy of which is attached hereto as Exhibit 36.

(c) All of the aforesaid monies, transferred to

Graven Realty, Inc., are proceeds of property of this estate or to which this estate is entitled.

17. The transfers of real property, personal property, cashier's checks, cash and shares of stock by defendants Graven, Graven Auction, and Graven Realty as set forth above were with the intent to hinder, delay, and defraud defendants Gravens' creditors. No consideration passed from Graven Auction, Graven Realty, of Bobby F. Graven as Trustee of the Bobby N. Graven Trust for said transfers and conveyances and all said transfers and conveyances were voluntary and without consideration for the purpose of hindering, delaying, and defrauding the creditors of defendants Graven.

18. At the time of the above transfers of property, and at all times relevant thereto, there were creditors of defendants Graven holding unsecured claims which would be allowable under 11 U.S.C. Section 502. Under the laws of the State of Missouri, the above transfers of real property, personal property, and shares of stock were and are in fraud of creditors and can and should be set aside.

19. There are not other properties or assets of this estate to use for the satisfaction, in whole or in part, of the claims of creditors against this estate, and unless the property above-described which was fraudulently transferred to defendants Graven Auction, Graven Realty, and Bobby F. Graven, Trustee, can be reached and applied to the assets of this estate, the claims of creditors against this estate must remain wholly unpaid.

20. On November 12, 1987, defendants Graven filed a petition under Chapter 12 of the U.S. Bankruptcy Code in this Court. In conjunction with the initiation of a Chapter 12 bankruptcy and the filing of schedules in connection therewith, defendants Graven represented to this Court and their creditors that there had

been no transfers of assets within one year prior to the date of the filing of their petition in bankruptcy and that they were not leasing any assets or property.

21. The acts and conduct of defendants Graven and the remaining defendants in connection with the transfer of assets owned by defendants Graven, or either of them, the acts and conduct of defendants Graven in initiating a Chapter 12 proceeding under the U.S. Code in this Court, and the acts and conduct of defendants Graven during the course of their Chapter 12 proceeding was part of an overall plan and conspiracy to conceal assets from their creditors and their Chapter 12 estate and to hinder, delay, and defraud their creditors so as to justify the imposition of punitive damages.

22. The plaintiff has no adequate remedy at law.

WHEREFORE, Richard V. Fink, Trustee, plaintiff, prays for the Court to enter its order in his favor and against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, Graven Realty, Inc., and Great Midwest Investments, Inc., as follows:

1. That the transfers of real property, personal property, cashier's checks, cash, and shares of stock as described above were fraudulent and void.

2. That the transfers of real property, personal property, cashier's checks, cash, and shares of stock as described above be set aside and held for naught.

3. That, in the event the Court finds that the defendants, or any of them. have disposed of any property that has been fraudulently transferred, to enter judgment in favor of the plaintiff and against defendants in the amount of the fair market value of the property that was

transferred.

4. That the Court should enter judgment in favor of the plaintiff and against defendants for punitive damages in an amount which would serve to punish the defendants and to deter the defendants and others from like conduct.

5. That the Court should enter judgment in favor of the plaintiff and against defendants for the reasonable attorney fees and expenses incurred by the plaintiff in bringing this action.

6. For the costs of this action and for such other and further relief as the Court may deem just and proper in the premises.

Count II

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count II of his Second Amended Complaint against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, Graven Realty, Inc., and Great Midwest Investments, Inc., and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of Count I of his complaint as though the same were fully set forth herein haec verba.

2. The above-named defendants are in possession of property that the plaintiff may use, sell, or lease. Under 11 U.S.C. §542, U.S. Bankruptcy Code, the defendants are required to deliver all of said property in their possession to the plaintiff and to account to the Court and the plaintiff for all property of defendants Graven, and proceeds thereof, which were transferred to the above named defendants, or any of them, and which they no longer possess.

3. The actions of the defendants, and each of them, were cone willfully, wantonly, and maliciously with an intent to harm the plaintiff, so as to justify the imposition of punitive damages.

WHEREFORE, Richard V. Fink, Trustee, on Count II of his Second Amended Complaint prays for the Court to enter judgment in his favor and against the defendants, Bobby Noah Grave, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, Graven Realty, Inc., and Great Midwest Investments, Inc., as follows:

1. That the real property, personal property, promissory notes, deeds of trust, contracts for deed, cashier's checks, cash, and all other assets as described in this complaint, transferred by defendants Graven to Graven Auction and Graven Realty and by Graven Auction to Great Midwest are assets of this estate and are to be turned over to the plaintiff as Trustee of this estate.

2. That the shares of stock in Graven Auction Company, Inc., and Graven Realty, Inc., transferred by defendants Graven to defendant Bobby F. Graven, Trustee under Bobby N. Graven Trust, are the assets of this estate and are to be turned over to the plaintiff as Trustee of this estate.

3. That the Court order and direct defendants Graven, Graven Auction Company, Inc., Bobby F. Graven, Trustee, Graven Realty, and Great Midwest, to account for all assets transferred by defendants Graven to any of the other defendants and, if previously not described herein, to turn over said assets to the plaintiff as Trustee of this estate.

4. In the event any of the defendants have converted or otherwise disposed of any of said assets, to

order that any proceeds of said assets are to be turned over to the plaintiff as Trustee of this estate and, if there are no remaining proceeds, to enter judgment in favor of the plaintiff and against defendants for the fair market value of the assets or proceeds converted.

5. To enter judgment in favor of plaintiff and against the above defendants for punitive damages in an amount which will serve to punish the defendants and to deter the defendants and other from like conduct.

6. To enter judgment in favor of plaintiff and against the above defendants for reasonable attorney fees and expenses incurred by the plaintiff in the bringing of this litigation.

7. For the costs of this action and for such other and further relief as the Court deems just in the premises.

Count III

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count III of his Second Amended Complaint against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., and Bobby F. Graven As Trustee under Bobby N. Graven Trust, and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of Count I of his complaint as though the same were fully set forth herein haec verba.

2. Certain transfers of real property previously described were transfers within one year from the date of the filing of defendants Gravens' petition under Chapter 12 of the U.S. Bankruptcy Code. In particular, the deeds previously identified as Exhibits 2, 6, 8, and 9 in paragraphs 8(b), (f), (h), and (i) of Count I were all transfers within one year of the date of defendants

Graven filing their petition under Chapter 12 of the U.S. Bankruptcy Code.

3. In making the transfers described in paragraph 2 hereof, defendants Graven received no consideration for said transfer, or received less than a reasonably equivalent value in exchange for such transfer and defendants Graven were insolvent on the date the transfers were made, or became insolvent as a results of such transfers.

4. The actions of the defendants, and each of them, were cone willfully, wantonly, and maliciously, with an intent to harm plaintiff.

WHEREFORE, Richard V. Fink, Trustee, on Count III of his Second Amended Complaint, prays for the Court to enter judgment in his favor against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust, as follows:

1. To avoid the transfers of real estate as reflected in the deeds marked Exhibits 2, 6, 8, and 9 and to declare the transfer of defendants Gravens' property as therein reflected to be null and void.

2. To enter judgment in favor of plaintiff and against the above defendants in the amount of the fair market value of the property transferred by the deed marked Exhibits 2, 6, 8, and 9.

3. To enter judgment in favor of plaintiff and against the above defendants for punitive damages in an amount which will serve to punish the defendants and to deter the defendants and others from like conduct.

4. That the Court should enter judgment in favor of the plaintiff and against the above defendants for the reasonable attorney fees and expenses incurred by the

plaintiff in bringing this action.

5. For the costs of this action and for such other and further relief as the Court may deem just and proper in the premises.

Count IV

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count IV of his Second Amended Complaint against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven As Trustee under Bobby N. Graven Trust, and Graven Realty, Inc., and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of Count I of his complaint as though the same were fully set forth herein haec verba.

2. The acts and conduct of defendants Graven, Graven Auction, Bobby F. Graven as Trustee, and Graven Realty in connection with the transfer of assets as aforesaid, the initiation of the aforesaid Chapter 12 proceeding by defendants Graven, and the acts and conduct of defendants Graven during the course of their Chapter 12 proceeding, as individuals and as officers, directors, and shareholders of Graven Auction and Graven Realty, were part of an overall plan and conspiracy to conceal assets from the creditors of this estate and the Chapter 12 estate and to hinder, delay, and defraud creditors of defendants Graven.

3. As a result of the acts and conduct by the above-named defendants as aforesaid, plaintiff has been damaged and creditors of this estate have been damaged, in the amount of Five Hundred Thousand Dollars ($500,000.00).

4. The acts and conduct of the above defendants were willful, wanton, malicious, and with an intent to harm the creditors

of the estate, and to deprive the creditors of the estate of the benefit of the assets of defendants Graven such as to justify the imposition of punitive damages.

WHEREFORE, on Count IV of his Second Amended Complaint, plaintiff Richard V. Fink, Trustee, prays for the Court to enter judgment in his favor and against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, and Graven Realty, Inc., for the sum of Five Hundred Thousand Dollars ($500,000.00) actual damages, for punitive damages in an amount which will serve to punish said defendants and to deter defendants and others from like conduct, and for the costs of this action.

Count V

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count V of his Second Amended Complaint against defendant Graven Auction Company, Inc., alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of Count I of his complaint as though the same were fully set forth herein haec verba.

2. From and after the date property of defendants Graven was transferred to defendant Graven Auction, defendant Graven Auction has liquidated, transferred, or otherwise converted said property to plaintiff's damage.

3. From and after the date any and all promissory notes contracts for deed, livestock, machinery, and farm equipment were transferred to defendant Graven Auction, defendant Graven Auction has collected proceeds due under the terms of said notes and contracts and has sold or otherwise disposed of said cattle, livestock, machinery, and equipment, and converted all of said

property to its own use, to the damage of the plaintiff and the estate.

4. As a result of the conversion of assets by defendant Graven as aforesaid, plaintiff has been damaged in the amount of Five Hundred Thousand Dollars ($500,000.00).

5. The actions of defendant Graven Auction were cone willfully, wantonly, and maliciously, with an intent to harm the creditors of the estate and to deprive the creditors of the estate of the benefit of the assets of defendants Graven so as to justify the imposition of punitive damages.

WHEREFORE, on Count V of his Second Amended Complaint, plaintiff Richard V. Fink, Trustee, prays for the Court to enter judgment in his favor and against defendant Graven Auction Company, Inc., for the sum if Five Hundred Thousand Dollars ($500,000.00) actual damages and for punitive damages in an amount which will serv e to punish defendants Graven and to deter said defendants and others from like conduct, and for the costs of this action.

Count VI

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count VI of his Second Amended Complaint against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, and Graven Realty, Inc., and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of Count I of his complaint as though the same were fully set forth herein haec verba.

2. Defendants, and particularly defendant Bobby Noah Graven, have controlled and manipulated Graven Auction and

Graven Realty as if there were no corporate entity.

3. Graven Auction, Graven Realty, and the Bobby N. Graven Trust are the alter egos of defendants Graven, and particularly defendant Bobby Noah Graven.

4. The business, if any, if defendants Graven Auction, Graven Realty, Bobby N. Graven Trust, and defendants Graven have constituted a single business enterprise.

5. Defendants Graven, Graven Auction, Graven Realty, and the Bobby N. Graven Trust, have common shareholders, officers, legal counsel, accounting advisors, and location.

6. The above-named defendants have used the assets of defendants Graven as if defendants Gravens' assets were their own.

7. The actions of the above defendants have stripped defendants Graven of their asets and ability to conduct business, all to the substantial detriment of thes estate and the creditors of theis estate.

8. The actions of the defendants above named, and each of them, were done willfully, wantonly, and maliciously, with an intent to harm the plaintiffs.

9. Under 11 U.S.C. §542 U.S. Bankruptcy Code, the dfendants are required to deliver and account for all property of defendants Graven.

WHEREFORE, Richard V. Fink, Trustee, on Count VI of his Second Amended Complaint, prays for the Cout to enter judgment in his favor and against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, and Graven Tealty, Inc., as follows:

1. That the corporate veils of defendants Graven Auction and Graven realty from the liabilities fo defendants Graven are pierced.

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2. That defendants Graven and defendant Bobby F. graven as Trustee under Bobby N. Graven Trust are the alter egos of defendatns Graven Auction and Graven Realty.

3. That the assets of defendants Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust are the assets of defendants Bobby Noah Graven and Millia Ann Graven and are to be turned over to the plaintiff.

4. That all books, records, documents, accounting records, and business records of all kinds and types of defendants Graven Auciton Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust are the books, records, and business records of defendants Graven and are to be turned over to the plaintiff.

5. Order an accounting of all assets of defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under Bobby N. Graven Trust.

6. Award the plaintiff punitive damages in an amount which will serve to punish the defendants and to deter the defendants and others from like conduct.

7. For the costs of this action and for such other and further relief as the Court deems just in the premises.

Count VII

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count VII of his Second Amended Complaint against defendant Will Fletcher, and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of

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Cont I of his complaint as though the same were fully set forht herein haec verba.

2. A portion of the property described in Exhibits 7 and 8 was subsequently conveyed by warranty deed by defendant Graven Auction to defendant Will Fletcher, a copy of which is attached hereto as Exhibit 14. The aforesaid warranty deed was purported to have been dated November 15, 1986, but was filed of record in the office of Recorder of Deeds on October 21, 1988.

3. At all times relevant hereto, defendant Will Fletcher was licensed by the State of Missouri to practice law in Missouri and was representing defendants Graven and defendant Graven Auction Company, Inc., and was well aware of defendants Gravens' Chapter 12 bankruptcy and the Trustee's investigation into the transfers of property by defendants Graven.

4. The transfer of property by defendant Graven Auction to defendant Will Fletcher as represented by Exhibit 14 was in effect a transfer of property by defendants Graven, not in the normal course of their business and, therefore, in violation of 11 U.S.C. Section 549, and should therefore by avoided.

5. The aforesaid transfer of property as represented by Exhibit 14 was subject to the original transfer of property to Graven Auction being void as in fraud of creditors and should be set aside.

6. The action of defendant Will Fletcher was done willfully, wantonly, nad maliciously, with and intent to harm the plaintiff, the above estate, and the creditors of hte estate.

WHEREFORE, Richard V. Fink, Trustee, on Count VII of his Second Amended complaint, prays for the Court to enter judgment in his favor and against defendant Will Fletcher as follows:

1. To avoid the transfer of real property from

defendant Graven Auction to defendant Will Fletcher as reflected by Exhibit 14 to this complaint and declare that the transfer of property therin reflected to be null and void.

2. To order that the property described in Exhibit 14 to this complaint be turned over to the plaintiff as Trustee of this estate.

3. Alternatively, to enter judgment in favor of the plaintiff and against defendant Will Fletcher in the amount of the fair market value of the property described in Exhibit 14.

4. To enter judgment in favor of plaintiff and against defendant Will Fletcher for punitive damages in an amount which will serve to punish said defendant and deter the defendant and others from like conduct.

5. To award the plaintiff his costs incurred herein and for such other and further relief as the Court may deem just in the premises.

Count VIII

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count VIII of his Second Amended Complaint against defendants Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under Bobby N. Graven Trust, Graven Realty, Inc., and Great Midwest Investments, Inc., and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of Count I of his complaint as though the same were fully set forth herein haec verba.

2. Since the institution of defendants Gravens' Chapter 12 bankruptcy proceedings, defendant Graven Auciton has proceeded to collect monies due on the aforesaid promissory notes, deeds of

trust, mortgages, and other evidences of credit in favor of defendants Graven; that, further, defendant Graven Auction has transferred, sold, conveyed, and intends to sell and transfer, various items of real estate, cattle, farm equipment, and other items of personal property obtained from defendants Graven.

3. Since the institution of defendants Gravens' Chapter 12 bankruptcy proceedings, defendant Graven Realty has received monies and property of this estate or to which this estate is entitled, such monies or properties resulting from the sale of property which is property of this estate or to which this estate is entitled; that, further, defendant Graven Realty has thereafter transferred said monies to other accounts and other enitles and intends to further transfer and convey said monies and property to prevent this estate and creditors of this estate from obtaining said properties or monies.

4. Defendant Great Midwest is receiving monies and property of this estate or to which this estate is entitled, such monies or properties resulting from the transfer of assets as earlier set forth herein.

5. Plaintiff believes that the aforedescribed defendants should be restrained and enjoined from transferring, conveying, depreciating, or wasting any of said property and should be required to account to the Court for all property received and transferred since the debtors' filing of their Chapter 12 proceeding so as to preserve any potential assets of this bankruptcy estate.

6. That plaintiff has no adequate remedy at law.

WHEREFORE, Richard V. Fink, Trustee, on Count VIII of his Second Amended Complaint, prays for the Court to enter its orders as follows:

1. To temporarily restrain, enjoin, and prohibit defendants Graven, individually and as officers, directors,

and shareholders of Graven Auction and Graven Realty, from transferring, conveying, selling, or otherwise disposing of, any and all property of any kind or type titled in the name of, owned by, or allegedly owned by Graven Auction or Graven Realty.

2. To temporarily restrain, enjoin, and prohibit Graven Auction andGraven Realty from transferring, conveying, selling or disposing of any property of any kind or type without further order of this Court;

3. To restrain, enjoin, and prohibit defendant Great Midwest from transferring, conveying, selling, or otherwise disposing of any property of any kind or type which was transferred to it by any other defendants in this litigation without further order of this Court.

4. To order and direct Graven Auction, Graven Realty, Great Midwest, and defendants Graven to account to the plaintiff for all property acquired by Great Midwest, Graven Auction, or Graven Realty, from defendants Graven or Graven Auction from and after January 1, 1985, to the date hereof and to account and advise the plaintiff of all property Great Midwest, Graven Auction, and Graven Realty presently owns or claim to own;

5. To order and direct Great Midwest, Graven Auction, and Graven Realty to account for all promissory notes, deeds of trust, mortgages, or other obligations owed to defendants Graven or Graven Auction which were transferred to defendatns Great Midwest, Graven Auction, or Graven Realty and to account for all monies collected theron and to place all monies in its possession and all monies that it herafter receives in a separate bank account in the name of defendants Great Midwest, Graven Auction,

or Graven Realty and the plaintiff, and not to disburse any monies from said bank account without further order of this Court.

6. To order and direct Great Midwest, Graven Auction, and Graven Realty to account for all monies and property received by or through the sale or other disposition of any property which was originally acquired from defendants Graven, and to account for all monies collected as a result therof and to place all said monies or property in the possession of either company in a separate bank account in the name of defendants Great Midwest, Graven Auction, and Graven Realty and the plaintiff, and not to disburse any monies from said bank account without further order of this Court.

7. To order defendants to obtain an order of this Court, after notice and hearing, prior to conveying, transferring, or otherwise disposing of any property of any kind or type;

8. To make the above temporary restraining orders permanent until a determination is made whether any property transferred by defendants Graven should be turned over to the plaintiff; and

9. For such other and further order as the Court deems just in the premises.

Count IX

COMES NOW Richard V. Fink, Trustee, and for his cause of action on Count IX of his Second Amended complaint against defendants Bobby Noah Graven and Millie Ann Graven, and alleges and avers as follows:

1. Plaintiff restates, realleges, and incorporates by reference each and every allegation contained in paragraphs 1 through 25 of

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Count I of his complaint as though the same were fully set forht herein haec verba.

2. Defendants Graven, with intent to hinder, delay, or defraud creditors of this estate and the plaintiff as Trustee of their estate, hvave transferred, removed, destroyed, mutilated, and concealed their property within one year before the date of the filing of their petition.

3. Defendants Graven, with intent to hinder, delay, of defraud creditors of this estate and the plaintiff as trustee of their estate, have transferred, removed, destroyed, mutilated, and concealed property of the estate after the date of the filing of the petition.

4. Defendants Graven, and particularly defendant Bobby Noah Graven, knowingly and fraudulently in connection with the case:

(a) made a false oath; and

(b) witheld from the plaintiff, an officer of the estate, recorded information, including books, documents, records, and papers relation to the debtors' property and financial affairs.

5. Defendants Graven have failed to explain satisfactorily loss or deficiency of assets to meet the defendants' liabilities.

6. That as a result of the foregoing, defendants Graven are not entitled to a discharge in this bankruptcy.

WHEREFORE, Richard V. Fink, Trustee, on Count IX of his Second Amended Complaint, prays for the Court to enter its order denying defendants Bobby Noah Graven and Millie Ann Graven a discharge in this case, to dismiss this bankruptcy proceeding with prejudice to the refiling thereof, and for such other and further relief as the Court deems just in the premises.

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BUSSELL, HOUGH, O'NEAL, CROUCH & HALL
s/ Thomas J. O'Neal
Attorney for Plaintiff

I hereby certify that the annexed instrument is a true and correct copy of the original on file in the Office of the Clerk of the U.S. Bankruptcy Court.
s/ Cynthia Biagioli
Deputy Clerk
Date: Nov. 30, 1992

APPENDIX U — 11 U.S.C. § 101(18)
DEFINITION OF "FAMILY FARMER"

(18) "family farmer" means —

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership is which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation and;

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded.

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

(2)

No. 95-1435

In The

Supreme Court of the United States

October Term, 1995

In re ESTATE OF BOBBY NOAH GRAVEN,
In re ESTATE OF MILLIE ANN GRAVEN, deceased

GRAVEN AUCTION CO., INC., GRAVEN REALTY, INC.
and BOBBY F. GRAVEN, Trustee for the
BOBBY N. GRAVEN TRUST,

Petitioners,

vs.

RICHARD V. FINK, Trustee,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED FOR REVIEW

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT WHICH PETITIONERS SEEK TO HAVE REVERSED IS *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) AND NOT THE OPINION OF THE COURT OF APPEALS INVOLVED IN THE CURRENT APPEAL AND BECAUSE PETITIONERS WERE NOT PARTIES TO AND DO NOT HAVE THE RIGHT TO CONTEST SUCH PRIOR DECISION AND BECAUSE THE COURT OF APPEALS' OPINION *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) WAS AND IS CORRECT.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO DUE PROCESS AND TO A FAIR TRIAL, PETITIONERS FAILED TO RAISE SUCH ISSUES IN THE LOWER COURTS, AND CONCURRENT FINDINGS OF FRAUD HAVE NOW BEEN MADE BY THREE LOWER COURTS AND THIS COURT SHOULD THEREFORE NOT REVIEW SUCH FINDINGS OF FACT.

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STATEMENT OF JURISDICTION

This case originated in the United States Bankruptcy Court for The Western District of Missouri which obtained jurisdiction over the Debtors upon their filing of a Voluntary Petition in Bankruptcy under Chapter 12. The bankruptcy case was subsequently converted to Chapter 7.

The Trustee then filed an adversary action against the Debtors, the Petitioners herein, and others, over which the Bankruptcy Court exercised jurisdiction pursuant to 28 U.S.C. §157. The Bankruptcy Court entered a Memorandum Opinion and Judgment dated February 8, 1993, in such adversary. The Notice of Appeal was filed by Petitioners on February 18, 1993. The United States District Court for The Western District of Missouri, Southern Division, Judge Scott O. Wright presiding, exercised jurisdiction over the appeal pursuant to 28 U.S.C. §158(a) and affirmed the Bankruptcy Court's decision in a Judgment and Order dated May 9, 1994.

A Notice of Appeal was then filed by Petitioners on June 7, 1994. The United States Court of Appeals for the Eighth Circuit, exercising jurisdiction pursuant to 28 U.S.C. §158(d) affirmed the District Court in an Opinion and Judgment dated September 5, 1995. A Petition for Rehearing was filed on September 18, 1995, and denied in an Order dated October 10, 1995. A Petition for a Writ of Certiorari was mailed January 8, 1996, by Petitioners but returned by the clerk on January 19, 1996, for failure to comply with the Supreme Court Rules. Petitioner again served a Petition for a Writ of Certiorari on Respondent's

Counsel on March 5, 1996. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

11 U.S.C. §303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title-

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549 or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership-

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if-

> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or
>
> (2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment-

(1) against the petitioners and in favor of the debtor for-

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for-

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section-

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

11 U.S.C. §1112 Conversion or dismissal

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

11 U.S.C. §1208 Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under that chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including-

(1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1221 of this title;

(4) failure to commence making timely payments required by a confirmed plan;

(5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; or

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

(d) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

(e) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C. §1307 Conversion or dismissal

(e) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

28 U.S.C. §157 Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration

of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C. §158 Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

. . .

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and

decrees entered under subsections(a) and (b) of this section.

28 U.S.C. §1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

STATEMENT OF THE CASE

Debtors, Bobby N. Graven and Millie A. Graven, filed a Voluntary Petition under Chapter 12 of the Bankruptcy Code on November 12, 1987. The Debtors thereafter filed a Plan of Reorganization and a confirmation hearing on such plan was set for March 2, 1988. Several Creditors objected to the proposed plan and the Bankruptcy Court, Judge Frank W. Koger presiding, issued an order on March 23, 1988, directing the Trustee, Richard V. Fink, to conduct an investigation into the affairs of the Debtors. *In re Graven*, 84 B.R. 630 (Bankr. W.D. Mo. 1988).

The Trustee filed a preliminary report and a supplemental preliminary report with a hearing on such reports set for January 24, 1989. The Debtors, at such hearing, filed an Application for Voluntary Dismissal pursuant to 11 U.S.C. §1208(b). Thereafter, the Trustee filed the Trustee's Motion to Convert Case requesting the Court to convert the case to a case under Chapter 7 of Title 11 on February 10, 1989.

A hearing on the Application for Voluntary Dismissal and the Trustee's Motion to Convert Case was held on April 10, 1989, and resulted in a memorandum opinion dated May 23, 1989, in which the Bankruptcy Court granted the Motion to Convert Case to Chapter 7 and held that the Debtors' Motion to Dismiss was therefore moot. (App. p. 102a)[1]; *In re Graven*, 101 B.R. 109 (Bankr. W.D. Mo. 1989). The District Court affirmed such Order on March 29, 1990. The District Court's Order was itself affirmed by the United States Court of Appeals for the Eighth Circuit in the case of *In re Graven*, 936 F.2d 378 (8th Cir. 1991) ("*Graven I*"). (App. p. 69a).

The Trustee filed, on June 22, 1989, a Complaint against the Debtors, Graven Auction Company, Inc., Bobby F. Graven as Trustee under the Bobby N. Graven Irrevocable Trust, and Will Fletcher. A Second Amended Complaint was filed by the Trustee against Bobby Noah Graven, Millie Ann Graven, Graven Auction Company, Inc., Bobby F. Graven as Trustee under the Bobby N. Graven Trust, Will Fletcher, Graven Realty, Inc., and

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[1] All references to the Appendix refer to the Appendix contained in the Petition for Certiorari.

Great Midwestern Investments, Inc., on September 1, 1989. (App. p. 125a). Millie Ann Graven died on September 28, 1989. Her personal representative, Bobby F. Graven, was substituted as a party in the adversary proceeding before the Bankruptcy Court. A hearing on said Second Amended Complaint was held on July 17, 1992, resulting in a Memorandum Opinion dated October 30, 1992 (App. p. 54a), and a Judgment dated November 2, 1992. (App. p. 58a). Such Judgment was in favor of the Trustee and against the Debtors and the Appellants herein.

A hearing on the issue of damages was held on December 3, 1992, resulting in a Memorandum Opinion (App. p. 62a), and Judgment (App. p. 67a), dated February 8, 1993.

A Notice of Appeal was filed by Graven Auction Company, Inc., Graven Realty, Inc., and Bobby F. Graven as Trustee under the Bobby N. Graven Trust on February 18, 1993. The United States District Court for the Western District of Missouri, Southern Division, Judge Scott O. Wright presiding, affirmed the Bankruptcy Court's decision in a Judgment (App. p. 53a) and Order (App. p. 40a) dated May 9, 1994.

A Notice of Appeal from the District Court's judgment was filed June 7, 1994. The United States Court of Appeals for the Eighth Circuit affirmed the lower courts in an Opinion and Judgment dated September 5, 1995. (App. p. 1a, 7a). *In re Graven*, 64 F.3d 453 (8th Cir. 1995) ("*Graven II*"). A Petition for Rehearing was filed with the Court of Appeals on September 18, 1995. (App. p. 8a). The Court denied the Petition in an Order dated October

10, 1995. (App. p. 25a). A Petition for a Writ of Certiorari was mailed January 8, 1996, by Petitioners but returned by the Clerk for failure to comply with the Supreme Court Rules. Petitioners again served a Petition for a Writ of Certiorari on Respondent on March 5, 1996.

ARGUMENT

QUESTION I

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT WHICH PETITIONERS SEEK TO HAVE REVERSED IS *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) AND NOT THE OPINION OF THE COURT OF APPEALS INVOLVED IN THE CURRENT APPEAL AND BECAUSE PETITIONERS WERE NOT PARTIES TO AND DO NOT HAVE THE RIGHT TO CONTEST SUCH PRIOR DECISION AND BECAUSE THE COURT OF APPEALS' OPINION *IN RE GRAVEN*, 936 F.2d 378 (8TH CIR. 1991) WAS AND IS CORRECT.

The first question Petitioners are seeking to present to this Court for review concerns whether or not the conversion of the original Chapter 12 bankruptcy proceeding to a case under Chapter 7 was proper. It should first be noted that Petitioners are not the Debtors in the underlying bankruptcy proceeding, but were Defendants in an adversary proceeding brought after such conversion. The Bankruptcy Court, Judge Frank W. Koger, entered his order converting the case to Chapter 7 and denying the Debtor's Motion to Dismiss in the case of *In re Graven*, 101 BR 109 (Bankr. W.D. Mo. 1989). (App.

p. 102a). Such order was subsequently affirmed by the District Court, as well as the United States Court of Appeals for the Eighth Circuit. *Graven I*, 936 F.2d 378 (8th Cir. 1991). (App. p. 69a). Respondent, the Bankruptcy Trustee in the underlying bankruptcy case, in an adversary proceeding filed subsequent to the conversion, obtained a judgment against the Debtors as well as Petitioners. The Petitioners subsequently appealed that judgment which was affirmed by the District Court and by the United States Court of Appeals for the Eighth Circuit. *Graven II*, 64 F.3d 453 (8th Cir. 1995). (App. p. 1a). It is for the last judgment of the United States Court of Appeals for the Eighth Circuit that Petitioners are now seeking a Writ of Certiorari. However, it is the first decision by the United States Court of Appeals for the Eighth Circuit that the Petitioners are seeking to reverse.

This Court ordinarily will not address issues which were not raised or resolved in the courts below. See *Taylor v. Freeland and Kronz*, 112 S.Ct. 1644, 1649 (1992); *U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n.5 (1994). In this case, petitioners did not raise any questions regarding the conversion of the bankruptcy case from Chapter 12 to Chapter 7 until the appeal was pending before the Court of Appeals. *Graven II*, 64 F.3d at 455. (App. p. 4a). Petitioners' argument regarding the application of 11 U.S.C. §§303(a) and 1208(e) was first made in Petitioners' Motion for Rehearing before the Court of Appeals. (App. 8a). As a result, the Court of Appeals determined that such issue was not properly before it and, therefore, did not address such issue in its opinion. *Graven II*, 64 F.3d at 455. (App. p. 4a). As a result, this Court should not grant certiorari because the question presented was not raised

in the Bankruptcy Court or District Court and was not passed upon by any of the lower courts.

In addition, the Petitioners were not the Debtors in the underlying bankruptcy case and are therefore not in a position to complain regarding the conversion of the Debtors' bankruptcy case from Chapter 12 to Chapter 7. Such conversion was affirmed by the United States Court of Appeals for the Eighth Circuit and is now a final, binding judgment on the Debtors. Petitioners are, in essence, seeking relief on behalf of the Debtors who did not appeal from the underlying adversary action and who are not in a position to attack the Eighth Circuit's decision affirming the conversion.

Petitioners argue that they should be allowed to raise these issues at any time because such issues are jurisdictional. Petitioners' argument is that because the Bankruptcy Court should have granted the Motion to Dismiss filed by the Debtors, there should not be any bankruptcy case and therefore no adversary action against Petitioners would be possible. Petitioners fail to realize that once jurisdiction is established as to the Debtors, jurisdiction over the adversary in which Petitioners were involved was proper in the Bankruptcy Court under 28 U.S.C. §§157(a) and 157(b).

In this case, two items result in jurisdiction as to the Debtors being proper in the Bankruptcy Court. First, the Debtors filed a voluntary Petition in Bankruptcy under Chapter 12 of Title 11. Thereafter, the Debtors' Motion to Dismiss was denied and the case was converted to Chapter 7 by the Bankruptcy Court. Such Order was affirmed by the District Court and by the Court of Appeals. As a

result, the validity of the conversion to Chapter 7 and the jurisdiction of the Bankruptcy Court over the Debtors has been finally decided against the Debtor.

Petitioners should not be allowed to argue that jurisdiction is not proper as to the Debtors. To allow non-Debtors, such as Petitioners, to attack the jurisdiction of the underlying bankruptcy over the Debtors, if such parties prevail, would result in a bankruptcy case existing as to the Debtors but being improper as to third parties which would prevent the collection of assets of the estate. The Bankruptcy Court would not be able to carry out its function. Once a Bankruptcy Court's jurisdiction over Debtors is established as to the Debtors, third parties should not be allowed to attack such jurisdiction in an attempt to avoid liability to the bankruptcy estate.

Finally, the conversion from Chapter 12 to Chapter 7 of the underlying bankruptcy case was proper. All of the appellate and district courts that have addressed this issue have reached the same conclusion as reached in *Graven I*. See *In re Foster*, 121 B.R. 961 (N.D. Tex. 1990) aff'd without opinion 945 F.2d 400 (5th Cir. 1991) cert denied 112 S.Ct. 972 (1992); *In re Neal*, 181 B.R. 560 (D.Utah 1995); see also *In re Goza*, 142 B.R. 766 (Bankr. S.D. Miss. 1992). In addition, the Eleventh Circuit indicated its agreement with such decision in the case of *In re Cotton*, 992 F.2d 311 (11th Cir. 1993). The Court in *Cotton* distinguished its case because there had been no allegations of fraud against the debtors. The Court, discussing *Graven I*, explained that it "involved charges of fraud which the Court was entitled to consider before entering a dismissal" pursuant to 11 U.S.C. §1208(b). *In re Cotton*, 992 F.2d at 313.

Petitioners are now claiming that because the Debtors objected to the conversion of Chapter 7, that such conversion constituted the commencement of an involuntary Chapter 7 bankruptcy against the Debtors. Since 11 U.S.C. §303(a) prohibits an involuntary Chapter 7 case against a family farmer, such as the Debtors, Petitioners claim the conversion was improper. A reading of §303 in its entirety makes it clear that Petitioners' argument is wholly unsupported. Such section provides, in part, that:

> (a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a monied, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.
>
> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –
>
> > (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
> >
> > (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by

> one or more of such holders that hold in the aggregate at least $10,000 of such claims;
>
> (3) if such person is a partnership –
>
> (A) by fewer than all the general partners in such partnership; or
>
> (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or
>
> (4) by a foreign representative of the estate in a foreign proceeding concerning such person.

11 U.S.C. §303.

None of the actions which constitute commencement of an involuntary case under §303(b) were taken in this case. There is nothing in the code and Petitioners have cited no cases indicating that a conversion of a voluntary case under Chapter 12 to a case under Chapter 7 is the equivalent of the commencement of an involuntary Chapter 7 case under §303. The Debtors voluntarily subjected themselves to the jurisdiction of the Bankruptcy Court by filing a voluntary petition under Chapter 12 of Title 11 and were therefore subject to conversion under 11 U.S.C. §1208.

Petitioners' interpretation of 11 U.S.C. §1208 results in a requirement of the Debtors' consent before a case can be converted to Chapter 7 under §1208(d). A reading of the corresponding sections from Chapter 11 and 13 of Title 11 indicate that no such requirement was intended

by Congress. Section 1112 provides for either dismissal or conversion to Chapter 7 in certain situations. However, subsection (c) of that section provides that:

> The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

11 U.S.C. §1112(c). Chapter 13 has a similar provision which provides:

> The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

11 U.S.C. §1307(e). There is no provision in Chapter 12 which requires that the conversion to Chapter 7 be only on the debtor's request. If Congress had intended to limit the power of the court to convert a case under §1208(d), it could have easily included a provision similar to the ones included in Chapters 11 and 13. Petitioners would have this Court amend §1208 by adding such a provision. Such amendment is for Congress, not the courts, to make.

Petitioners, among other things, argued that allowing the conversion to Chapter 7 against the desires of the debtors/farmers would allow creditors to indirectly create an involuntary case where they cannot do so directly. The difficulty with Petitioners' argument is that in order to have conversion under §1208, the Debtors must have voluntarily filed a petition in bankruptcy under Chapter 12. As a result, the Debtors would have placed themselves voluntarily into bankruptcy where they are subject

to the provisions of §1208. Therefore, the only time a family farmer will be forced into a case under chapter 7 pursuant to that section is if the family farmer voluntarily files bankruptcy and it is then determined that such family farmer committed fraud in connection with the case. This is hardly the equivalent of an involuntary petition under §303.

As Petitioners did not raise any issue regarding conversion of the underlying bankruptcy case from Chapter 12 to Chapter 7 in either the Bankruptcy Court or the District Court and such issue was not passed upon in the Court of Appeals, such issue is not properly preserved for this Court's review. Further, Petitioners are seeking to reverse a decision of the United States Court of Appeals for the Eighth Circuit which was rendered in 1991 and which did not involve the Petitioners. Moreover, the Court of Appeals' decision in *Graven I*, 936 F.2d 378, is and was correct and Petitioners' arguments do not warrant review of that decision. As a result, the Petition for Certiorari should be denied.

QUESTION II

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO DUE PROCESS AND TO A FAIR TRIAL, PETITIONERS FAILED TO RAISE SUCH ISSUES IN THE LOWER COURTS, AND CONCURRENT FINDINGS OF FRAUD HAVE NOW BEEN MADE BY THREE LOWER COURTS AND THIS COURT SHOULD THEREFORE NOT REVIEW SUCH FINDINGS OF FACT.

Petitioners, in their second question presented, complained that they were denied due process and a fair trial because the courts had predetermined the issues involved in the adversary proceeding. However, the remedy Petitioners seek is the review of the Eighth Circuit's decision in *Graven I*, 936 F.2d 378, for allegedly misinterpreting the word "fraud" when affirming the conversion of the Debtors' Chapter 12 bankruptcy to a case under Chapter 7. While it is clear that Petitioners were not denied a fair trial or due process in this case, such denial would not provide justification for review or reversal of a decision by the Court of Appeals rendered over five and a half years ago in *Graven I*.

The Court of Appeals discussed the issues which were raised in the lower courts on this appeal. The Court explained:

> The defendants appealed to the district court. They raised four appeal points – two relating to the alterego determination and two dealing with the fraudulent transfer findings. The district court affirmed in full, finding that the alter-ego determination was not clearly erroneous and that the evidence fully supported the

> bankruptcy court's conclusion that the transfers were based upon actual fraudulent intent of the debtor. The defendants appeal.
>
> The Defendants have presented six issues on appeal: (1) Whether the district court erred in affirming the bankruptcy court's determination that the trustee proved fraud; (2) Whether the district court erred in affirming the judgment which was not "clear, definite, and certain"; (3) Whether the district court erred in affirming the judgment of the bankruptcy court converting the case from chapter 12 to chapter 7; (4) Whether the district court erred in affirming the bankruptcy court's denial of the Gravens' motion to dismiss the chapter 12 proceeding; (5) Whether the district court erred in affirming the bankruptcy court's finding that the transfers of assets from the Gravens to Graven Realty and Graven Auction were fraudulent transfers; and (6) Whether the district court erred in affirming the bankruptcy court's finding that transfers of stock from Graven Realty and Graven Auction to the Bobby N. Graven Irrevocable Trust were fraudulent transfers.
>
> The Defendants did not raise issues 2, 3, and 4 before the district court, and accordingly, those issues are not properly before this court here on appeal. (Citation omitted). Thus, the only issues the defendants have preserved for review are those relating to the fraudulent transfers.

Graven II, 64 F.3d at 455.

Petitioners did not argue in either the District Court or the Court of Appeals that they were denied due

process and a fair trial or that the issues in the underlying adversary action had been predetermined in *Graven I*. Prior to the Petition for Rehearing filed with the Court of Appeals, Petitioners had not even discussed *Graven I*. *Graven II*, 64 F.3d at 456. Since this question presented was not raised or resolved in the lower courts, this Court should refuse to address it by Writ of Prohibition. See *Taylor*, 112 S.Ct. 1644, 1649 (1992); *Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n.5 (1994).

Further, as discussed under Question I above, Petitioners herein are not the Debtors in the underlying bankruptcy case and are not in a position to attack the conversion of the bankruptcy case from Chapter 12 to Chapter 7. Such conversion was properly ordered by the Bankruptcy Court and subsequently affirmed by both the District Court and the Court of Appeals. That judgment is final and not open to attack in this proceeding.

As for Petitioners' claims of denial of due process and a fair trial, such claims are wholly unsupported by the record. Petitioners were given ample opportunity to present evidence regarding the adversary proceeding. However, the evidence presented during the adversary proceeding was almost identical to the evidence presented on the Motion to Convert Case to Chapter 7. As the Court of Appeals explained, when faced with the same legal issues and the same evidence, the courts will reach the same conclusion. *Graven II*, 64 F.3d at 455-56.

A finding of fraud, such as is involved in this case, is a question of fact. *Graven II*, 936 F.2d at 382. The United States Court of Appeals for the Eighth Circuit, like this Court, follows the "Two Court Rule" which means that

the court will not ordinarily review concurrent findings of fact made by two lower courts unless there is a showing of a very obvious and exceptional error. *Graven II*, 64 F.3d at 455; *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 69 S.Ct. 535, 538 (1949). Because Petitioners have not shown such a very obvious and exceptional error, the Court of Appeals determined that it need not review the arguments regarding fraud. The court, however, went on to determine that the finding of fraud was supported and correct. *Graven II*, 64 F.3d at 456. As a result, there have now been concurrent findings of fraud by three lower courts without any showing by Petitioners that such determinations are not correct. Further, on six different occasions, based on the identical evidence, the courts have determined that such evidence justifies a finding of fraud. As a result, this Court should not disturb such factual finding.

Petitioners cite to nothing in the record indicating that they were denied a fair trial or prevented from presenting any evidence. The Court of Appeals discussed how the evidence presented in this case justified the finding of fraud the same as such evidence justified the original conversion from Chapter 12 to Chapter 7. The court stated:

> Moreover, in our view, this case involves the same facts and the same legal standard involved in *Graven I*. While the bankruptcy code sections involved in the two cases are different – in *Graven I* the issue was whether under section 1208(d) the Gravens engaged in fraudulent activity that would justify converting the case from chapter 12 to chapter 7, and in this case the trustee seeks to recover fraudulent transfers under either section 548(a) or section 544(b) – the governing legal standards are identical. In

> *Graven I*, we looked to the legal standards for fraudulent conveyances under section 548(a)(1) and under Missouri law (applicable under section 544(b)) to determine whether the Gravens had engaged in fraudulent activity for the purposes of section 1208(d). Both section 548(a) and Missouri law define fraudulent conveyances as those conveyances made with the "intent to hinder, delay or defraud" creditors.
>
> In *Graven I*, we concluded that the evidence abundantly supported the lower courts' conclusions that the Gravens made the transfers with the "intent to hinder, delay or defraud" their creditors and that there was no error in converting the case from chapter 12 to chapter 7. 936 F.2d at 383-84. The findings of fraud in *Graven I* applied to the transfers from the Gravens to Graven Auction and Graven Realty, as well as to the transfers from Graven Auction and Graven Realty to the Bobby N. Graven Trust.
>
> The bankruptcy judge, who we affirmed in *Graven I*, reached the same conclusion in this case after reviewing the same facts and applying the same legal standards. The defendants have not attempted to distinguish this case from *Graven I*, nor have they even discussed *Graven I*. Thus, we conclude that *Graven I* is controlling authority in this case, and we affirm the findings and conclusions of the lower courts.

Graven I, 64 F.3d at 455-56 (footnote omitted).

It is clear from the Court of Appeals' opinion that Petitioners were not precluded from litigating the issues in this adversary proceeding. The court did not invoke either of the doctrines of Collateral Estoppel or Res Judicata. The Court simply applied the precedent found

in *Graven I*, 936 F.2d 378. Under identical facts and legal questions, the court did and should reach the same conclusion. Since Petitioners were not denied due process or a fair trial, and they are not in a position to attack the decision in *Graven I*, 936 F.2d 378, the Petitioners' Petition for Certiorari should be denied.

CONCLUSION

Because neither of the questions presented by Petitioners were raised or resolved in the lower courts and Petitioners are attacking a Judgment of the Court of Appeals in which they were not parties and there is no basis for setting aside the decisions of the lower courts in this case, the Petition for Writ of Certiorari should be denied. The Court of Appeals, in addressing Respondent's Request for Sanctions, stated that "this appeal closely borders on the frivolous" but, in its discretion, chose not to impose sanctions. *Graven II*, 64 F.3d at 456. As was the case before the Court of Appeals, Petitioners have presented nothing of merit for this Court's review.

Respectfully submitted,

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